Illegitimate Parents

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This Article is the first to survey the parentage laws of all fifty states and assess whether they allow both members of unmarried same-sex couples to establish legally recognized relationships with their children. My research shows that only eleven states provide robust legal rights to unmarried same-sex couples and their children, while thirty provide only limited or uncertain protection, and nine offer no recognition at all. Most jurisdictions make it difficult, or even impossible, for both members of a same-sex couple to establish secure legal parent-child relationships with their children without getting married.

Before Obergefell v. Hodges *brought marriage equality to the United States, many activists and commentators expressed concern that winning access to marriage would restrict, rather than enhance, LGBTQ people's liberty. They claimed that marriage equality would force LGBTQ people to conform to heteronormative sexual values by entering monogamous marriages and that those who failed to do so would face further marginalization. This Article looks at the situation on the ground in all fifty*

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*states following marriage equality and finds a more complicated reality. Access to marriage has benefitted many same-sex couples who want to be parents directly, because by marrying they can access joint adoption, step-parent adoption, or the marital presumption. Some states have also liberalized their parentage laws post-*Obergefell *in ways that benefit both married and unmarried same-sex parents. But it is also the case that in most U.S. states, both members of an unmarried same-sex couple cannot establish a legally secure parent-child relationship with their child at birth. The non-biological or non-adoptive parent faces an uncertain child custody situation or has no right to custody at all; the only way a same-sex couple can both be full legal parents of their child is to get married. States that formerly excluded* all *same-sex couples from establishing joint parentage of their children now permit married couples access to legally recognized parent-child relationships, but unmarried same-sex couples are still shut out.*

This Article creates a taxonomy of U.S. jurisdictions, dividing them into three categories: first, those that provide robust protections to all LGBTQ families including unmarried same-sex couples and their children; second, those that provide only limited or uncertain protection to non-biological parents in unmarried same-sex couples; and third, those that are hostile, offering no protection. It delineates the harms of conditioning parentage on marriage, and suggests that while anti-gay discrimination persists in many states' family law regimes, unmarried same-sex couples have solid claims for recognition. State laws excluding LGBTQ people from legal rights to their children because they choose not to marry violate the equal protection and due process rights of LGBTQ parents, subjecting them to sex discrimination and abrogating their fundamental right to parent. A more pluralistic system of parentage laws may ultimately emerge; the 2017 Uniform Parentage Act would end the legal marginalization of unmarried LGBTQ parents if adopted by all the states. Congress could also act to protect LGBTQ families by requiring states to adopt legislation recognizing the parental rights of non-biological parents of children conceived through Assisted Reproductive Technology. Without such reforms, same-sex couples in many states will have no choice but to marry if they want secure parental rights to their children. Non-biological parents who fail to marry may be treated as legal strangers to their children and face permanent separation from them.

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> "Justice for gay men and lesbians will be achieved only when we are accepted and supported in this society despite our differences from the dominant culture and the choices we make regarding our relationships."[1]

INTRODUCTION

Not all members of the LGBTQ community agreed that marriage equality was an appropriate goal before it was ultimately achieved in *Obergefell v. Hodges*.[2] Many activists and commentators expressed concern that winning access to marriage would restrict, rather than enhance, LGBTQ people's liberty.[3] They claimed that marriage equality would force LGBTQ people to conform to heteronormative sexual values by entering monogamous marriages and that those who failed to do so would face further marginalization. Some legal scholars also expressed concern that the struggle for marriage equality would undermine efforts to secure relationship recognition outside of marriage. Nancy Polikoff argued that lesbian co-parents who secured legal parentage based upon marriage were "winning backward" because "parentage recognition derived from marriage [would] reduce the urgency of advocating protecting parent-child relationships on more

[1] Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L LESBIAN & GAY Q. 6 (1989), *reprinted in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 22 (Suzanne Sherman ed., 1992).

[2] Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[3] *See generally, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (urging advocates to press for legal reform to support all kinds of families, rather than pursuing "one-size-fits-all marriage").

suitable grounds."[4] Even if the LGBTQ rights movement ultimately won access to marriage for same-sex couples, the large number of Americans who lived outside of marriage would "still be without those supports that every family deserves."[5] Leaders in the battle for marriage equality frequently engaged these critiques, arguing pointedly that the fight for the freedom to marry was just that: a fight for freedom that would ultimately make marriage available, but not compulsory, for same-sex couples.[6] Some might suggest that the treatment of unmarried same-sex parents post-*Obergefell* shows there was a problem with the LGBT movement's pursuit of marriage. This Article is the first to survey the parentage laws of all fifty states and assess whether they allow both members of unmarried same-sex couples to establish legally recognized relationships with their children. My research shows that only eleven states provide robust legal rights to unmarried same-sex couples and their children, while thirty provide only limited or uncertain protection, and nine offer no recognition at all. Most jurisdictions make it difficult, or even impossible, for both members of a same-sex couple to establish secure legal parent-child relationships with their children without getting married. But the advent of marriage equality did not cause the lack of recognition for nonmarital LGBTQ families, and *Obergefell* may prove to be a step toward a more pluralistic family law system.

Achieving marriage equality has allowed some same-sex couples to access the numerous social and legal benefits that come with marriage, as well as easing the stigma imposed by their prior exclusion.[7] As Justice Kennedy himself noted, access to these legal protections is especially beneficial to same-sex couples and their children, who previously suffered "significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[8] One crucial reason why LGBTQ families' lives were more difficult and uncertain without marriage was that states

[4] Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722 (2012).

[5] POLIKOFF, *supra* note 3, at 8.

[6] *See, e.g.*, Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 599 (1994) (arguing that "[m]ost lesbians and gay men see the right to marry as, first and foremost, a fundamental choice they wish to make for themselves as a basic part of their life plan together").

[7] As Courtney Joslin puts it, "[i]t is difficult to overstate the impact of the *Obergefell* decision on the lives of LGBT people." Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 438 (2017) [hereinafter *The Gay Rights Canon*].

[8] Obergefell v. Hodges, 576 U.S. 644, 668 (2015).

precluded non-biological parents from establishing legally secure parent-child relationships, so one partner in a same-sex couple was often a legal stranger to their children.[9] Access to marriage opened up avenues to legally secure parent-child relationships, including the marital presumption of parentage, joint adoption, and step-parent adoption.

Some states have also liberalized their parentage laws post-*Obergefell* in ways that benefit both married and unmarried same-sex parents.[10] But in most U.S. states, both members of an unmarried same-sex couple cannot establish a legally secure parent-child relationship with their children. The non-biological or non-adoptive parent faces an uncertain child custody situation or has no right to custody at all; the only way a same-sex couple can both be full legal parents of their child is to get married. States that formerly excluded *all* same-sex couples from establishing joint parentage of their children now permit married couples access to legally recognized parent-child relationships, but unmarried same-sex couples are still shut out.

After the Supreme Court's marriage equality decision in *Obergefell v. Hodges* came down, numerous commentators suggested that the Court had cemented marital supremacy and demeaned unmarried couples and their children.[11] Melissa Murray called the Court's rhetoric "cause for

[9] Gay and lesbian couples where one partner is transgender, and the other cisgender, may be able to have a child for whom both partners are genetic parents. *See, e.g.*, L.M. v. C. McG., No. 1093 EDA 2018, 2018 WL 4656473 (Pa. Super. Ct. Sept. 28, 2018) (affirming trial court's handling of custody dispute in the case of a divorcing lesbian couple who had a biological child together. One of the mothers was transgender and had banked sperm prior to undergoing gender-confirming medical treatment; her wife became pregnant after undergoing alternative insemination with the preserved sperm.).

[10] For example, some states have adopted the 2017 Uniform Parentage Act, which grants unmarried same-sex couples access to parentage through gestational surrogacy, gamete donation, and ART, eliminating much of the discrimination unmarried same-sex couples face in parentage law. *See* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 598-99 (2018) [hereinafter *Nurturing Parenthood*] (describing how the new UPA helps address the needs of same-sex couples by eliminating gender-based distinctions and the protecting functional parent-child relationships).

[11] *See, e.g.*, Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1518 (2018) (suggesting that "the legalization of the same-sex marriage has prompted overt forms of discrimination when it comes to how the states have defined 'parent'"); Anthony C. Infanti, *Victims of Our Own Success: The Perils of* Obergefell *and* Windsor, 76 OHIO STATE L.J. FURTHERMORE 79, 82 (2015) (commenting on how the narrow goal of achieving marriage equality through litigation has "set back the movement for [overall] equal legal treatment of all").

serious concern — even alarm"[12] arguing that Justice Kennedy's opinion portrayed life outside of marriage as "undignified, less profound, and less valuable,"[13] than the "ideal" family form of marriage. In her view, *Obergefell* "preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family and relationship formation."[14] Clare Huntington similarly argued that the Court's opinion "made the lives of nonmarital families lesser,"[15] by "reinforc[ing] the notion that these [nonmarital] families are deviant."[16] Many other prominent scholars, while celebrating *Obergefell*'s result, also criticized the opinion for entrenching the supremacy of marriage and potentially undermining the rights of unmarried people.[17]

Others have expressed hope, however, that marriage equality could ultimately lead to the opposite result: greater pluralism and legal rights for people in a variety of family forms. Doug NeJaime argues that "[b]y treating same-sex couples' families as worthy of respect and by attending explicitly to children raised by same-sex couples, Obergefell invest[ed] nonbiological parenthood with constitutional status,"[18] laying a foundation for greater recognition of non-marital as well as marital LGBTQ families. Courtney Joslin similarly claims that "Obergefell can support, rather than foreclose, a broader constitutional right to form families, including nonmarital families."[19]

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[12] Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209 (2016).

[13] *Id.* at 1210 (noting that "*Obergefell*'s rhetoric further entrenches marriage's cultural priority, and indeed makes it a matter of constitutional law").

[14] *Id.* at 1211.

[15] Clare Huntington, Obergefell's *Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 31 (2015).

[16] *Id.* at 29.

[17] *See, e.g.*, Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126 (2015) ("In the process of explaining how vital marriage is to individuals and society, Obergefell repeatedly shames those who do not marry."); Infanti, *supra* note 11, at 82 ("[Obergefell] has actually set back the movement for equal legal treatment of all regardless of relationship status."); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 134 (2015) ("The extension of marriage rights to same-sex couples reinforces and entrenches the legal privileging of marriage at the expense of individuals and families who cannot, or do not wish to, marry.").

[18] Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 344-45 (2020) [hereinafter *Constitution*].

[19] Joslin, *The Gay Rights Canon*, *supra* note 7, at 488.

This Article surveys the parentage laws of all fifty states and assesses how unmarried same-sex couples and their children are being treated on the ground. It demonstrates that in most states it is difficult, or even impossible, for both members of a same-sex couple to establish secure legal parent-child relationships with their children without getting married. U.S. jurisdictions can be divided into three categories: first, those that provide robust protections to all LGBTQ families including unmarried same-sex couples and their children; second, those that provide only limited or uncertain protection to non-biological parents in unmarried same-sex couples; and third, those that are hostile, offering no protection. Only eleven states[20] provide robust legal rights to unmarried same-sex couples and their children, while thirty states[21] provide only limited or uncertain protection, and nine states[22] offer no recognition at all. While unmarried LGBTQ families enjoy robust protection in a small minority of states, in most jurisdictions a non-biological, unmarried same-sex parent has only uncertain protection or no parental rights at all.

The second novel contribution to the literature this Article makes is to delineate the constitutional claims that unmarried LGBTQ parents might raise to seek relief from the discrimination that they face. I suggest that the more optimistic view of the law's evolution after *Obergefell* is likely correct — while anti-gay discrimination persists in many states' family law regimes, unmarried same-sex couples have solid claims for recognition and a more pluralistic system of parentage laws may ultimately emerge.

Part I briefly delineates the struggle for marriage equality and notes that issues of procreation and parenting dominated the debate over whether to allow same-sex couples to wed. Part II describes several recent cases where courts have limited or restricted LGBTQ parents' rights because they failed to marry once marriage was open to them. I note that states vary enormously in their treatment of same-sex parents and delineate three archetypal legal regimes: In the first category are states that offer robust protections for LGBTQ parents, regardless of

[20] California, Connecticut, Delaware, Maine, Maryland, Massachusetts, Nevada, New York, Rhode Island, Vermont, Washington, and the District of Columbia grant full protection to unmarried LGBTQ parents. *See infra* Part II.A and Appendix, tbl.1.

[21] Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. *See infra* Part II.B and Appendix, tbl.1.

[22] Alabama, Arizona, Florida, Louisiana, Michigan, Tennessee, Utah, Virginia, and Wyoming. *See infra* Part II.C and Appendix, tbl.1.

their marital status. In the second are states that offer only partial or uncertain protection. The third group of states are extremely hostile and make it impossible for unmarried LGBTQ parents to secure legal rights to their children. While those states in the first category do allow unmarried LGBTQ parents to obtain secure and equal legal rights to their children, they are a minority of U.S. jurisdictions. In most states, same-sex couples who do not marry have either no way for both partners to establish legal rights to their children or face uncertainty about whether their parental rights will be recognized. The only way they can fully establish equal parental rights is by getting married. If they fail to marry, the non-biological parent may not be recognized as a parent of their child. Part III examines the constitutional implications of this situation, and the reasons why state laws excluding LGBTQ people from legal rights to their children because they choose not to marry might violate the equal protection and due process rights of LGBTQ parents. Part IV concludes that state laws excluding LGBTQ people from legal rights to their children because they choose not to marry may violate the equal protection and due process rights of LGBTQ parents. Only by recognizing the harms of legal marginalization for unmarried LGBTQ parents can states create a more pluralistic and equal system of parentage laws.

I. LGBTQ PARENTS AND THE ROAD TO MARRIAGE EQUALITY

Over the decades when courts, legislatures, and voters wrestled with whether to grant same-sex couples the right to marry, issues of childbearing and parenting dominated the debate. When the Supreme Court first considered a same sex couple's challenge to a law that forbade them from marrying in 1972, it dismissed the appeal "for want of a substantial federal question."[23] The state court below had ruled that restricting marriage to heterosexual couples did not offend the Due Process or Equal Protection Clauses because having and raising children was central to the constitutional protection given to marriage.[24] The Minnesota Supreme Court declared that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[25] Without even bothering to elucidate the issue, the Supreme Court assumed that gay couples were incompatible

[23] Baker v. Nelson, 409 U.S. 810, 810 (1972), *overruled by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[24] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972).

[25] *Id.*

with having or raising children, and so could constitutionally be excluded from marriage.[26]

No court gave serious consideration to a lawsuit challenging same sex couples' exclusion from marriage until 1993, when Hawaii's highest court ruled that a ban on same-sex marriage discriminated on the basis of sex[27] and so the state would have to show a compelling state interest to justify excluding gay couples from marriage or the ban would be struck down as unconstitutional.[28] *Baehr v. Lewin* ultimately did not result in any gay or lesbian couples being able to marry — opponents persuaded Hawaii voters to amend the state's constitution so as to continue to outlaw same-sex marriage — but while it was pending thirty states adopted legislation banning gay marriages and Congress passed the Defense of Marriage Act in 1996.[29] The idea that Hawaii might permit gay couples to marry generated tremendous opposition. As Bill Eskridge explains, the anti-LGBTQ traditional family values movement "feasted on the possibility of Hawaii same-sex marriage like a lion on a gazelle."[30]

The struggle for marriage equality was not just a battle with conservatives who opposed all legal rights for LGBTQ people, however. Many LGBTQ people and LGBTQ-rights activists were also firmly against same-sex marriage.[31] LGBTQ-rights activists who opposed fighting for marriage rights raised a number of critiques in response to the above justifications. The most prominent were concerns that marriage equality would result in assimilation and the loss of gay and

[26] *See* Susan Hazeldean, *Anchoring More than Babies: Children's Rights After* Obergefell v. Hodges, 38 CARDOZO L. REV. 1397, 1403 (2017).

[27] Baehr v. Lewin, 852 P.2d 44, 64 (1993), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[28] *Id.* (remanding the case for the trial court to determine whether the statute survived strict scrutiny because it "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights").

[29] *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 474 (2001).

[30] *Id.* ("Overnight, the countermovement scored victories across the United States, as thirty-five states and the federal government adopted statutes refusing to recognize same-sex 'marriages.' In a final coup, [traditional family values] advocates persuaded the voters of Hawaii to amend the state constitution to override the judiciary's cautious move toward same-sex marriage.").

[31] *See* Mary Bernstein & Verta Taylor, *Marital Discord: Understanding the Contested Place of Marriage in the Lesbian and Gay Movement*, *in* THE MARRYING KIND? 1, 1 (Mary Bernstein & Verta Taylor ed., 2013) (discussing disagreement with the goal of attaining access to marriage within the LGBTQ rights movement and noting that "[r]arely has a social movement goal so central to [a] movement's political agenda been so fraught").

lesbian culture,[32] that attaining marriage would further marginalize LGBTQ people who did not marry, and that attaining the right to marry would stall the LGBTQ movement.

Notwithstanding these concerns, following the initial victory in Hawaii national gay legal organizations embraced the cause of marriage equality and began a determined effort to win marriage for same-sex couples. It "soon became the gay rights movement's most visible issue."[33] Advocates brought challenges to marriage bans in state courts around the country. Finally, in 2003 the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health* that the state's ban on same-sex marriage violated the Massachusetts constitution.[34] The state had argued that its existing marriage law was justified because it "provid[ed] a 'favorable setting for procreation'; [and] ensur[ed] the optimal setting for child rearing", which it said was "a two-parent family with one parent of each sex."[35] But the court rejected both arguments, pointing out that "fertility is not a condition of marriage, nor is it grounds for divorce,"[36] and that many same-sex couples have children, as did four of the plaintiff couples in the lawsuit.[37] Noting that the state "concedes that people in same-sex couples may be 'excellent' parents," the court found there was no rational relationship between the state's exclusion of same-sex couples from marriage and its stated goals of encouraging procreation and protecting children.[38] Following the decision, Massachusetts became the first state to permit same-sex couples to marry.[39]

Procreation continued to be raised as a justification to restrict marriage to different-sex couples as challenges to exclusionary marriage laws were brought in more and more states. Indeed, the fact that same-sex couples could not have biological children together was "probably the most common argument against gay marriage" as those cases were

[32] Of course, "[w]hile same-sex marriage may seem to some like assimilation, the strong opposition it has generated suggests that it continues to challenge dominant cultural norms." Bernstein & Taylor, *supra* note 31, at 20.

[33] POLIKOFF, *supra* note 3, at 90.

[34] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

[35] *Id.* at 961.

[36] *Id.*

[37] *Id.* at 963.

[38] *Id.*

[39] Pam Belluck, *Same-Sex Marriage: The Overview; Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES (Nov. 19, 2003), https://www.nytimes.com/2003/11/19/us/same-sex-marriage-overview-marriage-gays-gains-big-victory-massachusetts.html [https://perma.cc/7QGE-XCLD].

litigated.[40] Some courts were persuaded that states could limit marriage to different-sex couples for procreation-related reasons.[41] While initially marriage equality opponents argued that marriage bans were justified because homosexuality was immoral, they later adopted a less overtly homophobic argument that marriage could be restricted to heterosexuals because only they could reproduce *accidentally*.[42] The Indiana Supreme Court held that the state could allow only heterosexual couples to marry because "opposite-sex intercourse frequently results in unintended children while same-sex intercourse never will."[43] Limiting marriage to different-sex couples was therefore rationally related to "encourag[ing] heterosexual, opposite-sex couples to procreate responsibly and to have and raise children within a relatively stable, committed relationship."[44] Similarly, New York's highest court found that state was not constitutionally required to allow same-sex couples to marry because they "do not become parents as a result of accident or impulse"[45] and the state was free to use marriage "to create more stability and permanence in the relationships that cause children to be born."[46] Ironically, the claim that excluding same-sex couples from marriage was justified by heterosexuals' habit of accidental procreation rested on a suggestion that lesbian and gay people were superior to heterosexuals, at least in their ability to avoid bringing unwanted children into the world.[47] As several commentators have

[40] Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 193 (2005).

[41] *See* Standhardt v. Superior Ct. *ex rel.* Cnty. of Maricopa, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003) (holding that "the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest"); Lewis v. Harris, 875 A.2d 259, 268-69 (N.J. Super. Ct. App. Div. 2005) (holding that "our society and laws view marriage as something more than just State recognition of a committed relationship between two adults. Our leading religions view marriage as a union of men and women recognized by God . . . and our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children").

[42] *See* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMANS. 1, 25 (2009) ("In the accidental procreationist view, gay people are simply incapable of making rash or foolish decisions, at least when it comes to having kids.").

[43] Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

[44] *Id.*

[45] Hernandez v. Robles, 855 N.E.2d 1, 3 (N.Y. 2006), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[46] *Id.*

[47] Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 54 n.36 (2012).

noted, this variation of the standard procreation argument allowed courts to appear unbiased toward same-sex couples while still enforcing an exclusionary view of marriage.[48] Courts adopting it essentially gave a "back-handed compliment to gay and lesbian couples by deeming them too responsible for marriage."[49]

This was bitterly ironic given that LGBTQ people had long been vilified as sexual deviants whose promiscuity and lack of responsibility posed a public health threat.[50] Indeed, one extremely controversial argument that some gay people advanced for seeking marriage equality was that it would change LGBTQ people for the better, encouraging mature, responsible long-term relationships instead of reckless promiscuity.[51] Now gay couples were being denied the right to marry because they were *too* responsible.[52]

Marriage equality advocates responded to these arguments not by altogether rejecting the idea that marriage was linked to procreation, but by focusing on the fact that many same-sex couples do have children, whether through adoption or assisted reproductive technology.[53] Plaintiffs in lawsuits seeking access to marriage frequently highlighted the existence of their children and argued that those children were harmed by their parents' exclusion from marriage.[54]

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[48] Abrams & Brooks, *supra* note 42, at 26; Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 88-90 (2011).

[49] Abrams & Brooks, *supra* note 42, at 3.

[50] *See* Roberta A. Kaplan, *"It's All About Edie, Stupid": Lessons from Litigating* United States v. Windsor, 29 COLUM. J. GENDER & L. 85, 95 (2015) (noting that "[f]or decades, gay people and their relationships have been vilified as, among other things, threats to children. As recently as in the Proposition 8 campaign in California in 2008, gay people were maligned as perverts and pedophiles").

[51] *See, e.g.*, Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, THE NEW REPUBLIC (Aug. 27, 1989), https://newrepublic.com/article/79054/here-comes-the-groom [https://perma.cc/UX9U-WNFY] (arguing that marriage would be "good for gays. It provides role models for young gay people who, after the exhilaration of coming out, can easily lapse into short-term relationships and insecurity with no tangible goal in sight").

[52] Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights, and Responsibilities*, 43 ARIZ. STATE L.J. 1177, 1192-93 (2011).

[53] Cahill, *supra* note 47, at 71 ("Rather than simply challenge the claim that marriage is inherently procreative, litigants now increasingly argue that same-sex couples are procreative (albeit in a different way), and that they, no less than opposite-sex couples, can satisfy a procreative definition of marriage.").

[54] Attorneys for plaintiffs seeking marriage rights emphasized this not only in their legal arguments but in their selection of plaintiffs with children to bring marriage suits. *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 149 (2015) (noting that

Marriage equality advocates argued that allowing same-sex couples to marry would provide protection for the children of same-sex parents.

As a result, the effects of same-sex marriage bans on LGBTQ people as parents and their children continued to be a dominant theme when federal courts took up the question of marriage equality. When the Supreme Court considered the Defense of Marriage Act ("DOMA"), a federal law that denied federal recognition to same-sex marriages in *United States v. Windsor*, it did so in the case of Edie Windsor, who did not have children.[55] The Court nevertheless discussed DOMA's impact on children in detail.[56] Justice Kennedy stated that DOMA hurt children with same-sex parents by stigmatizing their families and burdening them financially. He found that DOMA, "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives"[57] The Court ruled that DOMA was unconstitutional and struck it down.[58]

Federal courts around the country heard challenges to state laws excluding same-sex couples from marriage following *Windsor*.[59] Many of those decisions also discussed same-sex couples' children and the harm they suffered because of marriage exclusion. Two particular themes sounded in the decisions: first, that marriage would provide legal protection and stability to same-sex parents and their children, and second, that exclusionary marriage laws inflicted a dignitary harm by deeming LGBTQ people unworthy of marriage and inferior to heterosexuals. In *Kitchen v. Herbert*, the Tenth Circuit found that statutes restricting marriage to opposite sex couples "deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity. Read literally, they prohibit the grant or recognition of any rights to such a family and discourage those children from being recognized as members of a family by their peers."[60] The

"[t]wo-thirds of the plaintiff couples [in *Obergefell v. Hodges*] have children, far higher than the less than eighteen percent of LGB couples generally").

[55] *See* Hazeldean, *supra* note 26, at 1405 (noting that "harm caused to children with same-sex parents by the denial of federal recognition played a significant role in the [*Windsor*] decision").

[56] *Id.*

[57] United States v. Windsor, 570 U.S. 744, 772 (2013).

[58] *Id.* at 774-75.

[59] *See e.g.*, Baskin v. Bogan, 766 F.3d 648, 656, 671-72 (7th Cir. 2014) (holding that a state excluding same-sex couples from marriage was unconstitutional and citing *Windsor*); Bostic v. Schaefer, 760 F.3d 352, 377, 383-84 (4th Cir. 2014) (same).

[60] Kitchen v. Herbert, 755 F.3d 1193, 1215 (10th Cir. 2014).

Fourth Circuit stated that same-sex marriage bans harm children with same-sex parents by "stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters."[61] In *Latta v. Otter*, the Ninth Circuit also struck down bans on same-sex marriage, finding that the benefits marriage offers to the children of opposite sex couples apply just as strongly to children of same-sex couples. The court held that:

> To allow same-sex couples to adopt children and then to label their families as second-class because the adoptive parents are of the same sex is cruel as well as unconstitutional. Classifying some families, and especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in "family values."[62]

When the Supreme Court took up the question of whether excluding gay and lesbian couples from marriage was constitutional in *Obergefell v. Hodges*, it also found "[t]he marriage laws at issue here . . . harm and humiliate the children of same-sex couples."[63] Marriage would grant same-sex parents stability and security; the Court noted "birth . . . certificates; . . . and child custody, support, and visitation" as "aspects of marital status" that gay and lesbian couples would be able to access through marriage.[64] Ultimately, the Court concluded that gay and lesbian couples were entitled to "equal dignity in the eyes of the law" and could not be "condemned to live in loneliness, excluded from one of civilization's oldest institutions."[65] The Court ruled that state laws excluding same-sex couples from marriage were unconstitutional, and that every state had to allow gay and lesbian couples to marry.[66]

The advent of marriage equality across the nation did indeed create an avenue to legal protection for many LGBTQ parents. Getting married does allow same-sex couples to access significant parenting protections. In every state, the spouse of a person who gives birth is presumed to be the second parent of the child.[67] In its 2017 per curiam decision in *Pavan v. Smith*, the Supreme Court held that states cannot refuse to list a woman's wife as the second parent of her child on the birth

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[61] *Bostic*, 760 F.3d at 383.

[62] Latta v. Otter, 711 F.3d 456, 474 (9th Cir. 2014).

[63] Obergefell v. Hodges, 576 U.S. 644, 668 (2015).

[64] *Id.* at 670.

[65] *Id.* at 681.

[66] *Id.* at 680-81.

[67] *See* Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 252 (2019).

certificate.[68] Marriage thus provides lesbian couples who conceive a child through donor insemination a marital presumption that the non-biological mother is the child's second parent. Getting married also allows same-sex couples to obtain parental rights through adoption. Every state allows married couples to jointly adopt a child together or to grant a spouse parental rights to an existing child through stepparent adoption. Many states do not allow unmarried couples to adopt together or obtain second-parent adoptions.[69]

There is reason for concern, however, that while marriage equality has achieved protection for some same-sex parents, in many states non-biological LGBTQ parents who forgo marriage still face tremendous discrimination.[70] Their failure to marry leads to them being treated as legal strangers to their children with no parental rights. Other states grant the non-biological parent in an unmarried same-sex couple only limited or uncertain protection, leaving them vulnerable to losing their children if the relationship with the biological parent ends. In those communities, LGBTQ people who want to have children with a same-sex partner must marry if they want to have equal parental rights.[71] Further reform is urgently needed to protect unmarried same-sex parents and their children.

II. THE TREATMENT OF LGBTQ PARENTS POST *OBERGEFELL*

As many scholars have noted, the laws governing parentage differ enormously from state to state, and often are not even consistent across different areas of law within the same state.[72] "The relative importance of biology, intent, contract, and parental function varies tremendously by jurisdiction and even by individual case, adding confusion and

[68] Pavan v. Smith, 137 S. Ct. 2075, 2078-79 (2017).

[69] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-103 (2021) (limiting adoption to married couples and individual adults); FLA. STAT. ANN. § 63.042 (2021) (limiting adoption to married couples or "an unmarried adult"); HAW. REV. STAT. ANN. § 578-1 (2020) (limiting adoption to married couples or individual unmarried persons).

[70] *See infra* Part II and Appendix, tbl.2 (noting that in nine states, both members of a same-sex couple cannot establish parental rights over their children unless they are married).

[71] *See infra* Part II and Appendix, tbl.2 (describing how thirty-one states grant unmarried non-biological same-sex parents only limited or uncertain protection, leaving them vulnerable to losing their children).

[72] *See* Jeffrey A. Parness, *Challenges in Handling Imprecise Parentage Matters*, 28 J. AM. ACAD. MATRIM. LAWS. 139, 148 (2015) ("[T]he crazy quilt of parentage laws in a single state itself also differs dramatically from the crazy quilt of parentage laws in many other states.").

unpredictability to a determination of critical importance."[73] LGBTQ people, who typically cannot have biological children through sex with an intimate partner are especially vulnerable if a state's laws do not recognize non-biological parents as legal parents.[74]

Now that same-sex couples have access to marriage, many judges have been quick to declare that discrimination against LGBTQ people in family law is over.[75] While acknowledging that in the past, parentage regimes that defined parents only in terms of biology or adoption or marriage were discriminatory since same-sex couples could not marry, they now say such limited recognition schemes are sexual-orientation-neutral. LGBTQ people can now marry and by doing so can secure parental rights through the marital presumption[76] or step-parent adoption, and so they are no longer disadvantaged.

In Oregon, access to marriage for same-sex couples led a Court of Appeals to make the standard for establishing parentage more restrictive. In *In re Madrone*,[77] the court held that since same-sex couples can now marry, there was nothing unconstitutional about the state's assisted reproductive technology statute being limited to married couples only. Previously, the court had found that it was unconstitutional to grant only married couples parentage rights based on their use of alternative reproductive technology, because doing so excluded same-sex couples.[78] But now that lesbian couples could choose to marry, the court found there is no problem with denying

[73] Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 703 (2015) (reviewing JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014)).

[74] *See* Leslie Joan Harris, Obergefell's *Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 57-58 (2017); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2297 (2017) [hereinafter *Nature*].

[75] *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 503-04 (2016) (Pigott, J., concurring) (arguing that expanding New York's definition of parent to include intended parents or de facto parents is not necessary because same-sex couples can now establish parentage through marriage. "To be sure, there was a time when our interpretation of 'parent' put same-sex couples on unequal footing with their heterosexual counterparts [but] . . . [s]ame-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed.").

[76] The marital presumption is a legal doctrine that assumes the spouse of a person giving birth is the other parent of the child. *See* June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 387, 387 (Bill Atkin & Fareda Banda eds., 2013) (noting that "[t]he marital presumption [that] children born within a marriage are children of the marriage is deeply rooted in Anglo-American law").

[77] 350 P.3d 495, 501 (Or. Ct. App. 2015).

[78] *Id.* at 499-501.

parental rights to an unmarried non-biological mother whose partner gives birth, even if they decided together to conceive the child and intended to be co-parents.[79] Gay and lesbian couples could now choose commitment without marriage just like straight people. "Because [the assisted reproduction statute] would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice."[80]

In Kentucky, the state Supreme Court had ruled in 2010 that non-biological mothers could seek custody or visitation if they were a "person acting as a parent."[81] In *Mullins v. Picklesimer*, the court held that a non-biological mother had standing to sue for custody and visitation with her child because she had functioned as a parent with the consent and encouragement of the biological mother.[82] By fostering a parent-child relationship between non-biological mother Mullins and their son, "Picklesimer waived her superior right to sole custody of the child in favor of a joint custody arrangement with Mullins."[83] In a recent unpublished decision, however, a Kentucky court of appeal found a non-biological mother in a very similar situation did not have parental rights. In *Delaney v. Whitehouse*,[84] the plaintiff made much the same factual showing that the non-biological mother had made successfully in *Mullins v. Picklesimer*. Whitehouse had proved that "both parties agreed to artificial insemination for the purpose of having a child," that "both parties shared parenting responsibilities to some extent," and that they "held themselves out as a family unit[.]" [85] Yet the court ruled that Whitehouse had not met her burden of proving that her former partner had waived her superior custodial rights. In particular, the court noted that Delaney and Whitehouse never legally married, even though *Obergefell* brought marriage equality to Kentucky while they were still in a relationship.[86] The court assigned great significance to the fact that

[79] *Id.* at 500-01.

[80] *Id.* at 501.

[81] Mullins v. Picklesimer, 317 S.W.3d 569, 574-75, 577 (Ky. 2010) (holding that a non-biological lesbian mother had standing to sue for custody and visitation because she was "a person acting as a parent").

[82] *Id.* at 580-81.

[83] *Id.* at 579.

[84] No. 2017-CA-001774-ME, 2018 WL 6266774, at *2 (Ky. Ct. App. Nov. 30, 2018).

[85] *Id.* at *2.

[86] *Id.* The court also noted that some facts present in *Mullins v. Picklesimer* were absent in this case: Whitehouse and her partner had not given the child a hyphenated surname combining both their last names, or attempted to enter into a formal written agreement regarding custody, and Delaney had not allowed Whitehouse to continue

"the parties [did not] attempt to formalize their relationship after the decision of the United States Supreme Court in *Obergefell v. Hodges*. . . despite having had an opportunity to do so."[87] While "the parties did participate in a union ceremony after the child was born," the court found it of no consequence since it was "not a legally cognizable marriage ceremony," even though at the time the couple held their wedding, they had no access to legal marriage.[88] The court found that Delaney had not waived her right to exclude Whitehouse from their child's life.[89] As a result, Whitehouse did not have standing to seek custody or visitation. Concurring Judge Acree made the connection between Whitehouse's failure to marry and non-parental status even more explicit. In his view, "legal significance must be given to a decision not to marry. Electing not to marry when the opportunity is available should be deemed to fully contradict all allegations by anyone seeking rights to *another person's child* based on the *Mullins* partial waiver theory."[90] To fail to accord determinative significance to a couple's failure to marry would show insufficient respect to "the majesty of marriage."[91] In another case, the same Court of Appeals stated it was "[i]f not impossible, it is surely difficult to believe [*Picklesimer*] would have been decided identically in a post-Obergefell America," and ruled that functional parents could no longer seek custody or visitation based on *Picklesimer* since same-sex couples can now legally marry.[92] As the Kentucky Supreme Court put it, "the Court of Appeals majority essentially held that *Picklesimer*'s doctrine of partial waiver was a dead letter in light of *Obergefell*[.]"[93] Fortunately, however, the state's highest court rejected that contention. Instead, the Kentucky Supreme Court affirmed that *Picklesimer* is still good law. The Court stated in no uncertain terms, "[we] wholeheartedly disagree with the majority of the Court of Appeals that the legalization of same-sex marriage instituted

visiting the child after their relationship ended. But while all of these facts did support the finding in *Picklesimer* that the biological mother had waived her superior custody rights, none of them were dispositive — the issue was whether the biological mother had encouraged the formation of a parent-child relationship between the child and the non-biological mother.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at *3 (Acree, J., concurring) (emphasis added).

91 *Id.*

92 S.R.V. v. J.S.B., No. 2020-CA-0549-ME, 2020 WL 7083301, at *6 (Ky. Ct. App. Dec. 4, 2020), *aff'd in part*, *rev'd in part and remanded*, No. 2021-SC-0008-DGE, 2021 WL 4487638 (Ky. Sept. 30, 2021).

93 J.S.B. v. S.R.V., 630 S.W.3d 693, 699 (Ky. Sept. 30, 2021).

by *Obergefell* in any way affected the holding in *Picklesimer*."[94] In 2018, the Virginia Court of Appeals refused to recognize a non-biological mother who had raised her child along with her partner for seven years, and then continued to co-parent for two years after their breakup until the biological mother cut off all contact. The court noted that "[t]he parties never married or formed a civil union in another state, nor did Hawkins ever adopt B.G."[95] Of course, same-sex marriage was not permitted in Virginia at any time during their relationship, and nor was second parent adoption for an unmarried couple, so Hawkins had no option to marry Grese or adopt their child even if she wanted to do so. The trial court had awarded Hawkins joint custody and visitation because their son "was developing behavioral problems based on his separation from Hawkins, and two psychologists, as well as the guardian ad litem, testified that removing either Hawkins or Grese from B.G.'s life would cause emotional and psychological harm."[96] But the appellate court found that Hawkins was not a parent because "the term 'parent' contemplates a relationship to a child based upon either the contribution of genetic material through biological insemination or by means of legal adoption."[97] It further held that this definition of parentage was not discriminatory because, when a couple is not married "the non-biological/non-adoptive partner is not a parent irrespective of gender or sexual orientation."[98] The court also emphasized that while "the law of the Commonwealth barred Hawkins and Grese from marrying [during their relationship], . . . the record does not indicate this was the sole reason they remained unmarried."[99] Since Hawkins had not married her partner and could not conclusively demonstrate that she would have married her were marriage open to them, there was no problem with excluding her from her son's life. To rule otherwise, the court said, would transform *Obergefell* into "a tool for the erosion of the object of its aspiration—a family structure based upon marriage."[100]

Similarly, in *Lake v. Putnam*, the Michigan Court of Appeals held that a non-biological mother could not be the equitable parent of her child because she and the biological mother were not married.[101] While same-sex marriage was not legal in Michigan during the parties' thirteen-year

[94] *Id.* at 704.
[95] Hawkins v. Grese, 809 S.E.2d 441, 443 (Va. Ct. App. 2018).
[96] *Id.* at 443-44.
[97] *Id.* at 445-46.
[98] *Id.* at 447.
[99] *Id.*
[100] *Id.* at 448-49.
[101] Lake v. Putnam, 894 N.W.2d 62, 67-68 (Mich. Ct. App. 2016).

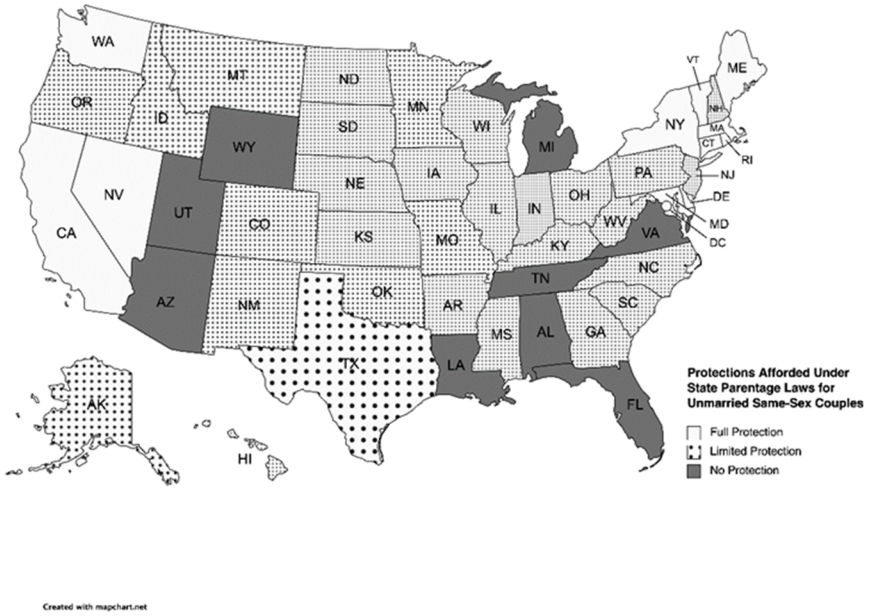
relationship, the court nevertheless faulted Lake for failing to provide "any evidence reflecting the parties' intent to marry," and emphasized that the parties "never made an effort to marry in another jurisdiction[.]"[102] As such, the application of Michigan's statute limiting equitable parenthood to spouses of the biological parent did not discriminate against Lake. "[H]ad she been married to the child's biological parent, regardless of whether the biological parent was male or female, the outcome of this appeal would have been different. But she was not."[103] Given that Lake was faulted for failing to marry when marriage was not even available in the state of Michigan, clearly going forward LGBTQ parents who refuse to marry in that state will not have legal rights to their children even if they function as parents.

Not every state takes such a restrictive view of parentage. The treatment of LGBTQ parents varies enormously, with some communities offering a variety of routes for same-sex couples to establish equal rights to their children, and others offering no protection at all to a non-biological parent who does not marry their child's legal parent. Despite the variation in states' laws, however, it is possible to divide jurisdictions into three categories: first, those states that offer robust protection to unmarried same-sex parents; second, those states giving only partial or uncertain protection; and third, states that are hostile and grant no rights to the non-biological parent in an unmarried

[102] *Id.* at 67.

[103] *Id.*

same-sex couple. The map below and Table 1 at the Appendix shows which category each of the fifty states belongs in.



Of course, determining whether a given state's laws are inclusive of unmarried same-sex parents requires attention to the various ways in which LGBTQ people form families with children. Most same-sex couples cannot create biological children together. Instead, LGBTQ people form families with children through a variety of means, including assisted reproductive technology and adoption. The options a given couple will have to create a child depend on their financial and reproductive resources. A couple where one partner can become pregnant can use alternative insemination with donor sperm to create a child. This option costs no money if the sperm is donated by a friend for free and the couple performs the insemination themselves at home. Purchasing sperm from a commercial sperm bank and using a healthcare professional to perform the insemination is more expensive, and may cost over a thousand dollars per attempt to get pregnant.[104] If the person who will carry the baby wants to use their partner's egg, rather than their own, then reciprocal IVF is needed in addition to the donor sperm. During reciprocal IVF, doctors extract eggs from the non-

[104] *See* Nicole Harris, *Artificial Insemination: Procedures, Costs, and Success Rates*, PARENTS (Apr. 23, 2019), https://www.parents.com/getting-pregnant/infertility/treatments/artificial-insemination-procedures-costs-and-success-rates/ [https://perma.cc/CT4L-NAWC].

gestating partner and then combine them with donor sperm to create an embryo, which is then placed in the uterus of the partner carrying the baby. Reciprocal IVF costs at least $10,000 per attempt and can cost much more, depending on whether the couple has health insurance to cover any of the costs or must pay for everything out of pocket.[105] If neither partner in a couple can become pregnant, and they want to create a biological child, then they will need to use a surrogate to carry their baby. Surrogacy is very expensive, even if the couple have a friend or family member willing to carry the baby as an uncompensated "compassionate" surrogate.[106] A couple who wants to use one partner's sperm and conceive through surrogacy must pay for donor eggs, the surrogate's medical expenses for IVF, prenatal care, and delivery, plus the legal fees to negotiate and create a surrogacy agreement. And in a commercial surrogacy arrangement, they would typically also have to pay the surrogate a fee for carrying the baby. Having a baby through commercial surrogacy in the U.S. costs at least $100,000 in total.[107] It is therefore only an option only for wealthy couples.

Many LGBTQ couples also create families with children through adoption. The cost of doing that varies tremendously depending on whether they pursue private, public, domestic, or international adoption. Becoming a licensed foster parent and then adopting a child through the state child welfare system involves negotiating a difficult bureaucracy but costs little to no money; adopting a baby from abroad or through a private adoption agency may cost tens of thousands of dollars.[108]

Finally, many LGBTQ couples raise children that one of the partners conceived during a prior heterosexual relationship, with the other

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[105] FAMILY EQUALITY, PATH 2 PARENTHOOD 2, https://www.familyequality.org/wp-content/uploads/2019/08/P2P-Factsheet-CostofPregnancy.pdf [https://perma.cc/RQZ2-DFDP]; *see also* Amy Klein, *What to Know About I.V.F.*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/article/ivf-treatment.html [https://perma.cc/2SH4-JZX3].

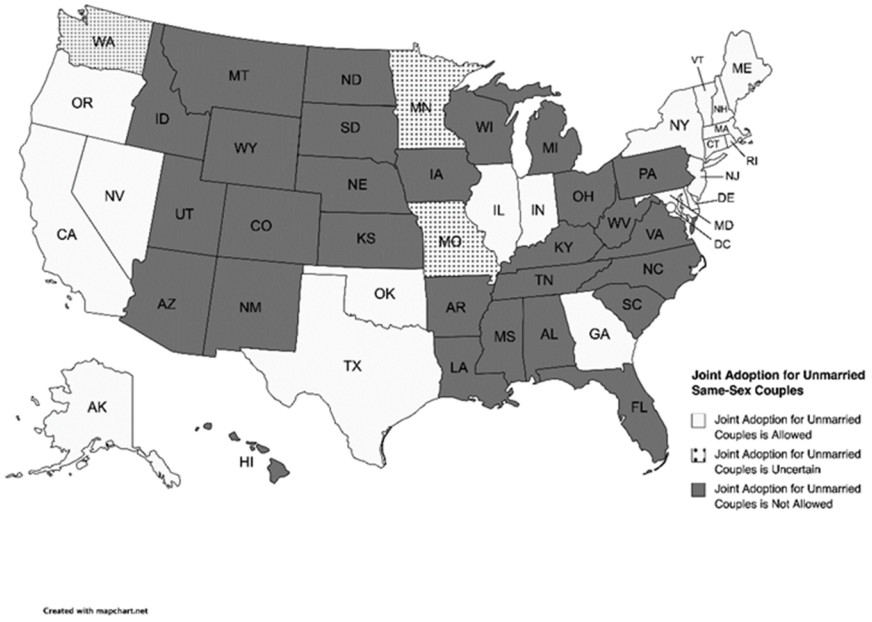
[106] *See* Sanjana Gupta, *Surrogacy Can Cost Upwards of $150,000 — Here are the Hidden Costs to Save for*, INSIDER (Mar. 26, 2021, 9:11 AM), https://www.insider.com/surrogacy-cost [https://perma.cc/WC4Y-8ESH] (noting that while intended parents can save on the agency costs and surrogate fees when using a compassionate surrogate to gestate their child, they would still have to pay all of the other costs associated with surrogacy).

[107] Susannah Snider, *The Cost of Using a Surrogate — And How to Pay for It*, U.S. NEWS (Nov. 24, 2020, 9:28 AM), https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it [https://perma.cc/6VVV-VTCB].

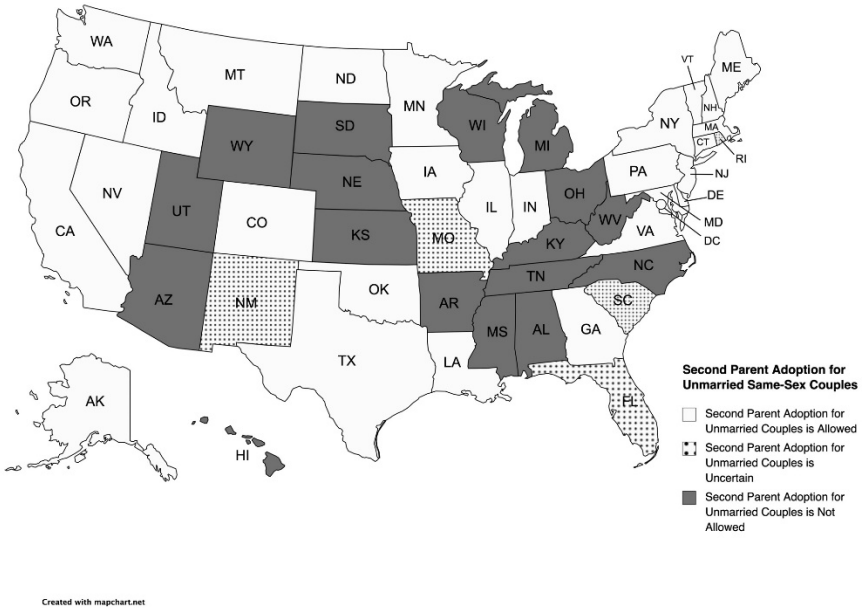
[108] David Dodge, *What I Spent to Adopt My Child*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/parenting/adoption-costs.html [https://perma.cc/83JC-73EZ].

partner playing a step-parent role. Still others take in children of family members or others who need help caring for them and may or may not formally adopt the child or otherwise establish custodial rights.

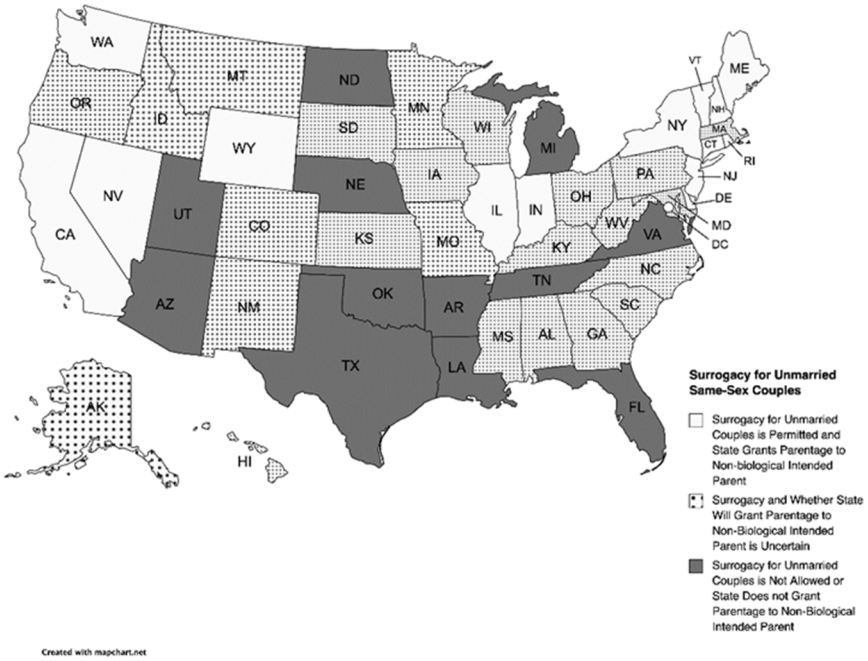
To determine how feasible these options to form a family with children are for unmarried same-sex couples in each state, I looked at the law governing adoption, ART, and parentage in each jurisdiction. Table 2 at the Appendix and the map below indicates whether each state allows unmarried same-sex couples to jointly adopt a child or limits joint adoption to married couples.



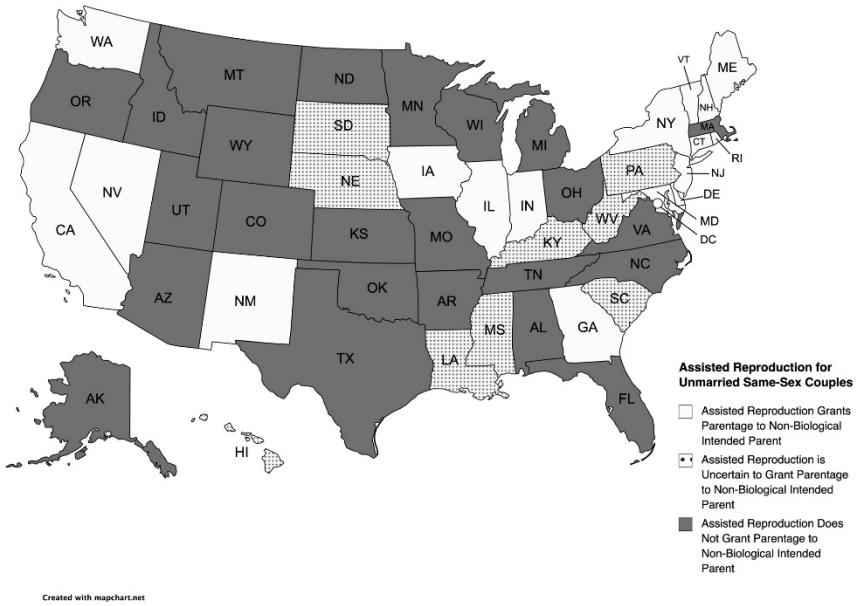
The map below indicates whether unmarried partner can adopt their partner's child in a second parent adoption in the state, or if only married couples can use step-parent adoption.



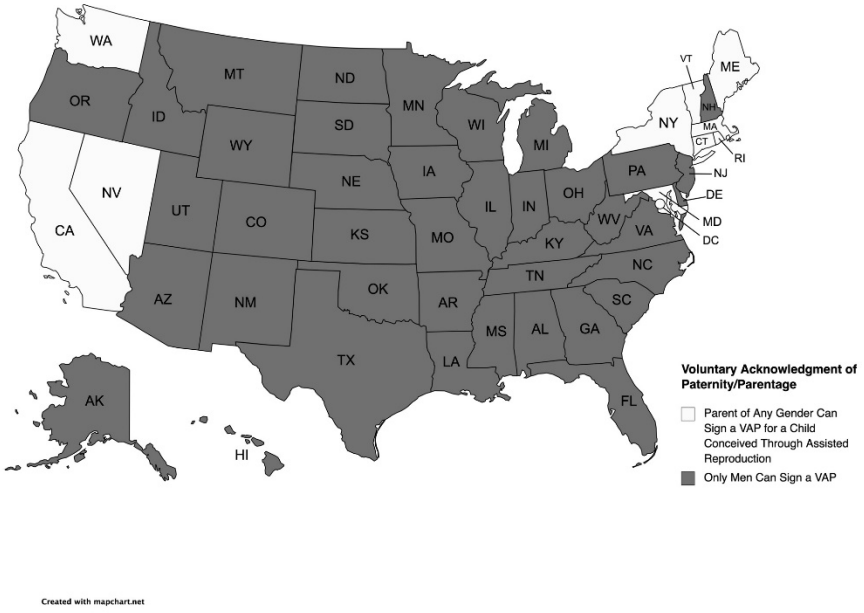
State laws governing surrogacy also vary; this map shows whether a state permits an unmarried same-sex couple to retain a gestational surrogate to carry their child.



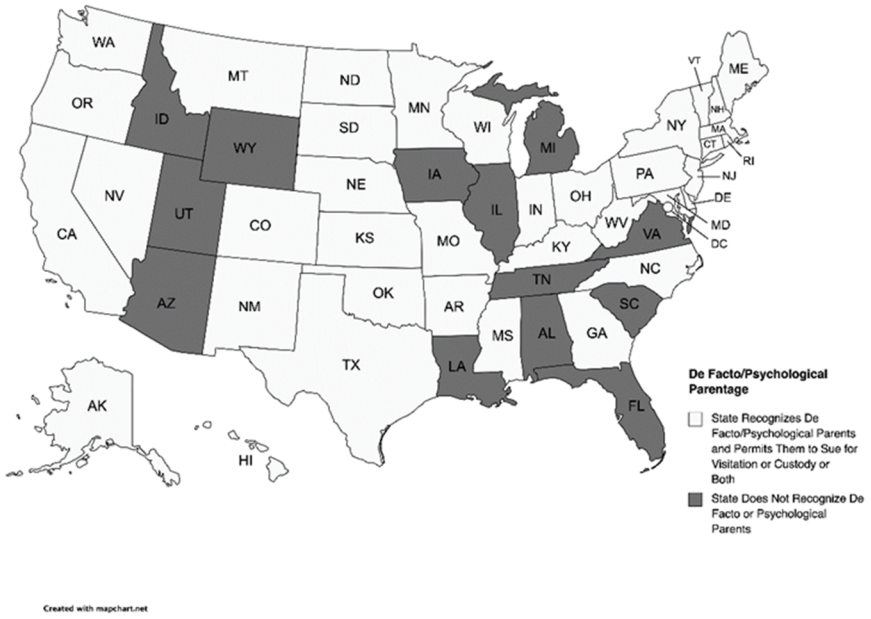
While this one shows whether the unmarried, non-biological intended parent of a child conceived through ART is recognized as a legal parent in the state.



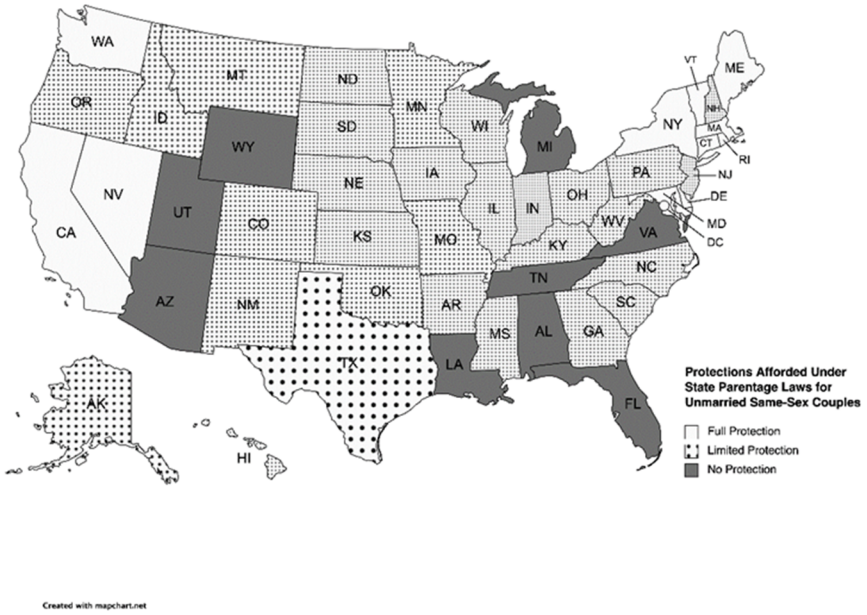
Only eleven states allow same-sex couples to use a Voluntary Acknowledgement of Parentage ("VAP") to legally establish the parentage of their child; other jurisdictions limits VAPs only to heterosexual couples, as shown on this map, below.



Finally, this map indicates whether the state grants any rights to non-biological, non-adoptive parents who have raised a child through a functional parentage doctrine like de facto parentage. States colored white allow people who function as parents to seek visitation or legal custody of their children. States shown in grey do not recognize functional parents at all, and regard them as legal strangers to their children.



States that grant all or most of these rights to unmarried same-sex parents, allowing them to access joint adoption, second parent adoption, gestational surrogacy, parentage through assisted reproductive technology, voluntary acknowledgements of parentage, and/or de facto parentage, are in category one: those with robust protection for unmarried non-biological LGBTQ parents. They are shown in white on the map below. States that do not recognize non-biological parents as full legal parents of their children but offer limited or uncertain protection through de facto parentage or a similar functional parentage doctrine are in category two, shown as dotted on the map. In the third category are states that are hostile to unmarried same-sex parents and give no legal recognition or rights to the non-biological parent in a same-sex couple. They are colored grey on the map.



To illustrate how this plays out, I describe three states' legal regimes below that are emblematic of the three categories that states fall into: Vermont grants robust protections to non-biological LGBTQ parents regardless of whether they marry or not, North Carolina gives limited recognition but no certainty to such parents, and Utah offers no recognition to non-biological same-sex parents who do not marry.

A. Full Equality: Vermont

In 2018, Vermont enacted a version of the 2017 Uniform Parentage Act ("UPA"),[109] becoming the second state to do so.[110] Vermont's Parentage Act[111] allows people to establish parentage through a variety of means, including through consent to assisted reproduction, de facto parenthood, and voluntary acknowledgement of parentage.[112] An unmarried same-sex couple in Vermont can create a child using assisted reproduction or gestational surrogacy,[113] and both partners will be legally recognized as the child's parents, regardless of whether they are genetically related to the child. Under Vermont law, "a person who consents . . . to assisted reproduction by another person with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."[114] So if a person becomes pregnant using assisted reproductive technology with her same-sex partner's consent, her partner is the second parent of the child even though she is not genetically related to their child and the couple are not married. Similarly, an unmarried same-sex couple can contract with a gestational surrogate in Vermont to carry and bear their baby and both partners will be parents "immediately upon the birth of the child."[115]

Unmarried partners can also establish parentage through "holding out." A person who lives with a child for the first two years of a child's life is presumed to be the child's parent if that person and another parent of the child "openly held out the child as the person's child."[116] So a woman whose partner gave birth to a child could become a "presumed parent" if she lived with the child for the first two years of the child's life and the parent and partner held her out as the second parent of the child. Another person claiming parentage, such as the other genetic parent, can challenge the parentage of a "presumed parent," but only by bringing a proceeding within two years after the child's birth.[117] Once the child is two years old, the presumed parent's status cannot be

[109] VT. STAT. ANN. tit. 15C, § 101 (2021).

[110] Washington was the first state to enact the 2017 UPA on March 6, 2018. Jamie D. Pedersen, *The New Uniform Parentage Act of 2017*, AM. BAR ASS'N (Apr. 1, 2018), https://www.americanbar.org/groups/family_law/publications/family-advocate/2018/spring/4spring2018-pedersen/ [https://perma.cc/GD9C-DYR2].

[111] § 101.

[112] *Id.* at § 201.

[113] *Id.* at § 802.

[114] *Id.* at § 703.

[115] *Id.* at § 803(a)(1).

[116] *Id.* at § 401.

[117] *Id.* at § 402 (2019).

disestablished, even if another person comes forward and proves that they are the genetic parent of the child.[118]

Non-biological LGBTQ parents of Vermont children do not even have to go to court to establish their parentage. The state permits "presumed parents" and intended parents of a child created through assisted reproduction or gestational surrogacy to sign a voluntary acknowledgement of parentage ("VAP") to establish their parental rights, even if they are not genetically related to the child.[119] While every state allows a man who believes he is the genetic father of a child to sign a voluntary acknowledgement of paternity and thus establish his legal parentage, Vermont is one of only ten states that allow parents of all genders to sign a VAP.[120] This is an important right because VAPs are readily accessible and do not require expensive or time-consuming court proceedings. Parents simply complete forms at the hospital and the signatories are named as parents on the child's birth certificate and legally recognized as child's parents. A valid acknowledgement of parentage "is equivalent to an adjudication of parentage of a child and confers upon the acknowledged parent all of the rights and duties of a parent."[121]

Vermont also recognizes functional parent-child relationships formed after a child is born. Under the Vermont Parentage Act, a person can qualify as a "de facto parent" with full parental rights if they "resided with the child as a regular member of the child's household for a significant period of time," "engaged in consistent caretaking of the child," "undertook full and permanent responsibilities of a parent

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[118] A genetic parent can bring a proceeding to establish his parentage more than two years after the birth if he did not know he was the genetic parent because of material misrepresentation or concealment, but even if he is adjudicated the genetic parent of the child "the court shall not disestablish a presumed parent." *Id.* at § 402(b)(2).

[119] *Id.* at § 301(a)(3-4). The person who gave birth to the child must also sign the VAP in order for it to be effective. *Id.* at § 301(b).

[120] The other states that allow parents of all genders to sign a VAP are the following: California, Connecticut, Maryland, Massachusetts, Nevada, New Jersey, New York, Rhode Island, Vermont, and Washington. *See* CAL. FAM. CODE § 7573(a)(2) (2021); CT LEGIS P.A. 21-15, 2021 Conn. Legis. Serv. P.A. 21-15 (H.B. 6321) (West) Section 25 and 26 (effective January 1, 2022), revised statute CONN. GEN. STAT. ANN. § 46b-172; MD. CODE ANN., FAM. LAW § 5-1028(c)(1)(vii) (2021); NEV. REV. STAT. §§ 126.053 to 126.680 (2021); N.J. STAT. ANN. § 9:17-41 (2021); N.Y. PUB. HEALTH LAW § 4135-b(1)(b) (2021); VT. STAT. ANN. tit. 15C, §§ 301(a)-(b) (2021); WASH. REV. CODE § 26.26A.200 (2021); *see also* COMMONWEALTH OF MASS., SAMPLE VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE (2019), http://www.glad.org/wp-content/uploads/2019/07/Voluntary-Acknowledgment-of-Parentage-Universal-Mass2019.pdf. [https://perma.cc/6KN2-2EJH].

[121] VT. STAT. ANN. tit. 15C, § 305(a) (2021).

without expectation of financial compensation," held themselves out as a parent of the child, and thus "established a bonded and dependent relationship with the child that is parental in nature."[122] The person claiming to be a de facto parent must also show that a parent of the child "fostered or supported the bonded and dependent relationship"[123] and that continuing the relationship is in the child's best interests.[124] Vermont's parentage statute explicitly does not limit a child to having only two parents; the law allows a court to determine that a child has more than two parents "if the court finds that it is in the best interests of the child to do so."[125]

The state also permits unmarried same-sex couples to establish parent-child relationships through adoption. Vermont has permitted second parent adoption since 1993, when the state's supreme court ruled that a lesbian could adopt her children without terminating the parental rights of her partner, the biological mother.[126] The state's statute was amended in 1995 to state explicitly that "[i]f a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent."[127]

Vermont's family laws embrace family formation through a variety of means without limiting legal recognition based on sexual orientation, marital status, or gender. LGBTQ Vermont residents can have children with a same-sex partner and be confident that state law will recognize their parental rights whether or not they marry. By adopting the 2017 UPA, the state has created a variety of paths to legal recognition for non-biological parents that can be used by LGBTQ families. A non-genetic parent who creates a child through assisted reproductive technology or establishes a functional parent-child relationship will be recognized as a parent, just as a biological parent would be.

Vermont is not alone in adopting progressive parentage laws that recognize LGBTQ couples and their children as families whether or not

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122 *Id.* at § 501(a)(1) (2021).

123 *Id.* at § 501(a)(1)(F).

124 *Id.* at § 501(a)(1)(G). A parent can fight allegations that he or she fostered a bonded and dependent relationship with evidence of "duress, coercion, or threat of harm." *Id.* at § 501(a)(2).

125 *Id.* at § 206(b).

126 *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993) (permitting a mother's lesbian partner to adopt without giving up her rights because "when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and unnecessary").

127 VT. STAT. ANN. tit. 15A, § 1-102 (2021).

they marry. California, Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, Maine, Nevada, New York, Rhode Island, and Washington also offer robust protection to unmarried same-sex parents.[128] In these states, LGBTQ parents can create families through joint adoption without being married. If one member of the couple gives birth to a child, the other parent can establish their parental rights through a VAP or second parent adoption. Unmarried same-sex couples can also hire a surrogate to gestate their child, and establish legal rights for the non-genetic parent. Whether a couple chooses to create their family through adoption, donor insemination, or surrogacy, they will not be required to marry in order to establish legal parental rights. All these methods of family formation are fully open to same-sex couples, whether or not they are married.

B. Limited Recognition Without Certainty: North Carolina

North Carolina law is less accepting of same-sex parents. The state does not permit unmarried couples to adopt jointly; if the person who files an adoption petition is "unmarried, no other individual may join in the petition[.]"[129] North Carolina also does not permit second parent adoption, so the unmarried partner of a child's biological or adoptive parent cannot obtain parental rights through adoption unless the legal parent gives up his or her rights.[130] Only by marrying can a same-sex couple jointly adopt a child together or affirmatively seek parental rights for the non-biological parent of their child through step-parent adoption.[131]

In *Boseman v. Jarrell*, the North Carolina Supreme Court ruled that a second-parent adoption obtained by a non-biological mother in Durham, North Carolina was void ab initio.[132] Julia Boseman and Melissa Jarrell began a romantic relationship in 1998, and started living together in 1999.[133] They decided to have a child using anonymous donor insemination.[134] Jarrell became pregnant, giving birth to their child in October 2002.[135] Following their son's birth, Boseman and Jarrell both held themselves out as his parents hyphenating their last

[128] *See infra* Appendix, tbls.2-3.
[129] N.C. GEN. STAT. ANN. § 48-2-301 (2021).
[130] Boseman v. Jarrell, 704 S.E.2d 494, 496-97 (N.C. 2010).
[131] *See* N.C. GEN. STAT. ANN. § 48-2-301 (2021).
[132] *Boseman*, 704 S.E.2d at 496-97.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 497-98.

names to make his surname.[136] They raised him together, sharing an "'equal role' in parenting."[137] In 2004, Jarrell and Boseman attempted to solidify Boseman's legal rights to their child by through a second parent adoption "by which [Boseman] would become a legal, adoptive parent while [Jarrell] would remain the minor child's legal, biological parent."[138] At the time, some judges in North Carolina were issuing such orders, even though the state's adoption law did not explicitly authorize them.[139] The county court in Durham, North Carolina approved the adoption, making Boseman her child's adoptive mother while Jarrell also remained his legal mother. The couple broke up in 2007. Initially, Jarrell allowed Boseman to visit, but she subsequently cut off contact. Boseman sued for custody and visitation in 2008. [140] In response, Jarrell argued that the adoption was void and that Boseman had no parental rights at all. She sought an order ruling that she was their child's sole legal parent with absolute discretion to terminate Boseman's contact with their son.[141] The trial court ruled against Jarrell and ordered joint custody, and the Court of Appeals affirmed. On appeal, the North Carolina Supreme Court held that the adoption was void ab initio because the state legislature "did not vest our courts with subject matter jurisdiction to create the type of adoption attempted here[.]"[142]

The court's controversial decision to overturn the adoption years after it was final turned the case from a battle between two legal parents to "a custody dispute between a parent and a third party."[143] Despite relegating Boseman to "third party" status, however, the court nevertheless affirmed the trial court's decision to award her joint legal custody of her son. The court noted that Jarrell as the biological and legal parent has a constitutional right to control of her child that ordinarily would give her the right to determine with whom he

136 *Id.*

137 *Id.*

138 *Id.*

139 Advocates quietly worked for years to secure the right to second-parent adoption in communities around the country by seeking out friendly judges who would grant such an adoption petition. *See* ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS 90-97 (Oxford Univ. Press, 2015) (finding that judges used their discretion in granting adoption and custody cases, even when they were restrictions in place, and that many states are moving towards granting second parent adoptions on a "county-by-county basis").

140 *Boseman*, 704 S.E.2d at 496-99.

141 *See id.* at 504-06.

142 *Id.* at 496-97.

143 *Id.* at 502-03.

associated.[144] But the court noted that a parent's paramount interest is abrogated when she "acts inconsistent with her constitutionally-protected status."[145] In such situations, the parent may "forfeit this paramount status, and the application of the 'best interest of the child' standard in a custody dispute with a non-parent would not offend the Due Process Clause."[146] In the case of Jarrell, the court ruled that by forming a family with Boseman and agreeing to co-parent their child on a permanent basis, she had given up her right to exclude Boseman from the child's life. Rather, the court found, when a child's legal parent intentionally creates a family unit in which their partner permanently shares parental responsibilities, that parent has "acted inconsistently with her paramount parental status."[147] Boseman thus qualified as a de facto parent, with a right to seek custody or visitation with her son.[148]

The fact that North Carolina recognizes de facto parents as parents is enormously important. It means that a non-biological parent like Boseman who has formed a parent-child relationship with the encouragement of the child's existing legal parent is not a legal stranger without any standing to seek custody or visitation. But while unmarried LGBTQ parents in North Carolina are not entirely without legal protection, they still face uncertainty about their legal relationships that can only be resolved if they get married. An unmarried same-sex couple in North Carolina cannot jointly adopt a child. If one member of the couple adopts or has a biological child, the other cannot establish legal parentage through a second-parent adoption.[149] If they function as a second parent with the legal parent's consent and encouragement, then they may be recognized as a de facto parent. But they will have to prove by clear and convincing evidence that their partner allowed them to share parental responsibilities in a family unit they created and did so "without any expectation of termination [thus] act[ing] inconsistently

144 *See id.* (noting that "[a] parent has an 'interest in the companionship, custody, care, and control of [his or her children that] is protected by the United States Constitution'").

145 *Id.* (quoting David N. v. Jason N., 359 N.C. 303, 307 (2005)).

146 Heatzig v. MacLean, 664 S.E.2d 347, 350-51 (N.C. Ct. App. 2008).

147 *Boseman*, 704 S.E.2d at 496.

148 The North Carolina Supreme Court had previously recognized a man as a *de facto* parent when he raised a child believing he was her biological father and only later learned they were not genetically related. Price v. Howard, 484 S.E.2d 528, 537 (N.C. 1997). A lower court had subsequently held that a lesbian non-biological mother qualified as a de facto parent because the biological mother had allowed her to hold herself out as a parent and make parental decisions for their child. Mason v. Dwinnell, 660 S.E.2d 58, 68-69 (N.C. Ct. App. 2008).

149 N.C. GEN. STAT. ANN. § 48-1-106 (d) (2021).

with her paramount parental status."[150] If the non-biological parent is able to prove that the legal parent has "acted inconsistently with her paramount parental status" then they have standing to seek custody or visitation if it is in the best interests of the child.[151] Establishing parental rights may thus require contested litigation, with all the attendant uncertainty and expense.[152]

In 2012, six same-sex couples filed a federal lawsuit, *Fisher-Borne v. Smith* to challenge North Carolina's failure to offer second-parent adoptions.[153] In their complaint, the plaintiffs noted that while North Carolina recognized de facto parentage, that status "can only be awarded by a judge in the context of a custody dispute, and is therefore unavailable to . . . intact families where both parents agree that they should have joint legal custody and share parental responsibilities and obligations."[154] As a result, same-sex couples like them had no way of establishing a legal relationship between both parents and their children. This had a number of negative consequences that affected all aspects of family life: "The harms to the Second Parent Plaintiffs range from the mundane — being unable to consent to school activities for their children — to the life threatening — being unable to consent to medical treatment, to the emotional — feeling that their parental role is less legitimate because it is not legally recognized by the state."[155] They alleged this situation violated the constitutional rights of both the legal and non-legal parents and their children. But after the U.S. Supreme Court struck down the federal Defense of Marriage Act in *United States v. Windsor*, the plaintiffs amended their suit to challenge the state's denial of marriage rights to same-sex couples instead. In 2014, the district judge struck down North Carolina's law excluding same-sex couples from marriage as unconstitutional, bringing marriage equality to the state.[156] But the court also dismissed the plaintiffs' challenge to the North Carolina adoption laws as moot or not ripe.[157] As a result,

150 *Boseman*, 704 S.E.2d at 504-05.

151 *Id.* at 502-03.

152 As Leslie Joan Harris notes, de facto parentage doctrines "cannot provide certainty about a child's legal parentage unless and until litigation occurs. Relationships remain vulnerable to disruption, and the expense and difficulty of litigation almost surely deters some functional parents from making claims that they could theoretically win." Harris, *supra* note 74, at 84.

153 Fisher-Borne v. Smith, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014).

154 Complaint at 11, Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (M.D.N.C. 2014) (No. 1:12-cv-589).

155 *Id.* at 44.

156 *Fisher-Borne*, 14 F. Supp. 3d at 698.

157 *Id.* at 699.

second parent adoption remains unavailable under North Carolina law and unmarried couples still cannot jointly adopt children. The Fisher-Borne plaintiffs wanted to legally marry and so could access step-parent adoption once they were afforded the right to do so. But LGBTQ parents in North Carolina who do not marry still have no way of formalizing the relationship between the non-adoptive/non-biological parent and their child other than arguing they are a de facto parent during a contested custody battle.

Most U.S. states have parentage laws similar to those of North Carolina: they offer some limited or partial protection to unmarried LGBTQ couples and their children, but they don't have the same protection as married couples and may face denial of their parental rights. Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin all have parentage regimes that offer only limited or uncertain protection to unmarried same-sex parents and their children.[158] The situation confronting unmarried LGBTQ couples in these states is certainly less bleak than that of people in states offering no recognition at all. But same-sex parents and their children in these communities still face significant disadvantages if they fail to marry.

Most of these states do not permit unmarried couples to adopt jointly or use second parent adoption to secure the rights of a non-biological parent.[159] So if a same-sex couple want to form a family through adoption, only one parent can adopt their child. The other partner may function as a parent, but they will not have the security of a legally recognized parent-child relationship through adoption. Similarly, if one member of an unmarried same-sex couple achieves pregnancy through ART, the gestating parent's partner will not get the benefit of the marital presumption, because they are unmarried. These states also do not recognize the intended second parent of a child conceived through ART as a legal parent,[160] and do not permit women to sign voluntary

158 *See infra* Appendix, tbls1-3.

159 Illinois and New Jersey are the exceptions. Those states do allow unmarried couples to adopt jointly and permit second parent adoption by the unmarried partner of an existing legal parent.

160 Illinois is an exception. Under Illinois law, the intended parent of a child conceived using assisted reproductive technology or gestational surrogacy is a legal parent. *See* 750 ILL. COMP. STAT. ANN. 46/703(b) (2021) ("If a person makes an anonymous gamete donation without a designated intended parent at the time of the

acknowledgements of parentage to establish their parentage of a child conceived through ART.[161] And in most of these states, a couple who conceive through ART cannot use second parent adoption to establish a legal parent-child relationship between the child and the non-gestating parent, because second parent adoption is not permitted by statute.

What almost all of these states do have that offers unmarried same-sex parents some protection are statutes or case law that provide some rights to people who function as a parent although they are not the biological or adoptive parent.[162] As noted above, North Carolina permits "de facto parents" to seek custody or visitation if they have functioned as a parent with the consent of the legal parent. Alaska,[163] Arkansas,[164] Colorado,[165] Georgia,[166] Hawaii,[167] Idaho,[168] Kansas,[169] Iowa,[170]

gamete donation, the intended parent is the parent of any resulting child if the anonymous donor relinquished his or her parental rights in writing at the time of donation. The written relinquishment shall be directed to the entity to which the donor donated his or her gametes."); 750 ILL. COMP. STAT. ANN. 46/103(m-5) (2017) (noting that the term "intended parent" means a person who enters into an assisted reproductive technology arrangement, including a gestational surrogacy arrangement, under which he or she will be the legal parent of the resulting child); *In re* T.P.S., 978 N.E.2d 1070, 1079 (Ill. App. Ct. 2012).

161 *See infra* Appendix, tbl.4.

162 Illinois is an exception. It does not recognize functional parents as parents. *In re* Scarlet Z.-D., 28 N.E.3d 776, 790 (Ill. 2015) (finding that a non-biological, non-adoptive parent could not petition for custody, visitation, or support as the child's "parent" because "Illinois does not recognize functional parent theories"); *see In re* T.P.S., 978 N.E.2d at 1085 (finding that neither the legislature nor the Illinois courts have ever recognized the equitable parent doctrine).

163 ALASKA STAT. § 25.20.060(a) (2021).

164 *See* Bethany v. Jones, 378 S.W.3d 731, 739 (Ark. 2011).

165 *See In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 588-89 (Colo. App. 2013) (holding that "we conclude that in the context of a same-sex relationship a child may have two mothers—a biological mother and a presumed mother—[and] we reverse the trial court's order denying Limberis' maternity petition. On remand, the trial court is instructed to determine whether Limberis is A.R.L.'s presumptive mother under the UPA's holding out provision").

166 GA. CODE ANN. § 19-7-3.1 (2021).

167 HAW. REV. STAT. ANN. § 571-46(a)(2) (2020).

168 IDAHO CODE § 32-1703(1)(b) (2021).

169 *See* Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013).

170 *See* Petition of Ash, 507 N.W.2d 400, 401 (Iowa 1993).

Indiana,[171] Minnesota,[172] Mississippi,[173] Missouri,[174] Montana,[175] Nebraska,[176] New Hampshire,[177] New Mexico,[178] North Dakota,[179] Ohio,[180] Oklahoma,[181] Oregon,[182] Pennsylvania,[183] South Carolina,[184] South Dakota,[185] Texas,[186] West Virginia,[187] and Wisconsin[188] also have functional parentage doctrines that may allow a non-biological, non-adoptive parent to seek custody or visitation with their child. The states vary in how they refer to claimants — some use the term de facto parent, or equitable parent, while others do not call such a person a "parent" at all, preferring the term "third party." The rights such functional parents can exercise also varies by jurisdiction. In some states, they can only seek visitation.[189] In others, like North Carolina, a de facto parent can seek custody over a child upon a showing that it would be in the child's best interests.[190] These functional parent doctrines often developed in cases involving a lesbian couple who had created a child using donor insemination and then raised the child together, but then, after the

171 IND. CODE § 31-9-2-35.5 (2021).

172 MINN. STAT. § 257C.08 (4) (2021).

173 *See* Miller v. Smith, 229 So. 3d 148, 152-53 (Miss. Ct. App. 2016) (holding that in a custody battle between "one standing in loco parentis and a natural parent, the parent is entitled to custody unless the natural-parent presumption is rebutted").

174 *See* K.M.M. v. K.E.W., 539 S.W.3d 722, 737 (Mo. Ct. App. 2017).

175 MONT. CODE ANN. § 40-4-228(2) (2021).

176 *See* Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011).

177 N.H. REV. STAT. ANN. § 168-B:2(d) (2021); *see also In re* Guardianship of Madelyn B., 166 N.H. 453, 462 (2014) (holding that the state's holding out provision must be construed as gender neutral).

178 N.M. STAT. ANN. § 40-11a-201(A)-(B) (2021).

179 *See* McAllister v. McAllister, 779 N.W.2d 652, 655 (N.D. 2010).

180 OHIO REV. CODE ANN. § 3109.051 (2021).

181 OKLA. STAT. ANN. tit. 43, § 112.5(5)-(6) (2021).

182 OR. REV. STAT. ANN. § 109.119(1) (2020).

183 *See* T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001); L.S.K. v. H.A.N., 813 A.2d 872, 875-77 (Pa. Super. Ct. 2002).

184 S.C. CODE ANN. § 63-15-60(A), (B), (C) (2021).

185 S.D. CODIFIED LAWS § 25-5-29 (2020).

186 TEX. FAM. CODE ANN. § 102.003(a)(9) (2021).

187 *See In re* Clifford K., 619 S.E.2d 138, 160-61 (W. Va. 2005).

188 *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 437 (Wis. 1995).

189 *See, e.g., id.* at 451 (finding that a non-biological non-adoptive parent does not have standing to petition for custody, absent a showing that the biological or adoptive parent is "unfit or unable to care for the child" or other "compelling circumstances," but may have standing to petition for visitation if it is "in the child's best interest").

190 This is significant because typically a non-parent cannot seek custody or visitation over the parents' objection absent a showing of unfitness. The best interests test is used when weighing competing claims from two parents.

couple broke up, the biological mother claimed she was the only parent and denied the other mother contact with the child.[191] Wisconsin decided the seminal case *Holtzman v. Knott* in just such a situation in 1995, awarding Sandra Holtzman visitation with her children.[192] After that, many states followed suit.[193]

De facto parentage doctrines are very powerful. They offer legal recognition of family relationships grounded in actual caretaking and family function rather than formal legal status.[194] This is incredibly important for members of the LGBTQ community, who were long excluded from formal legal recognition because their families were deemed unworthy of institutions like marriage or adoption. A family law regime that looks to how people behave in their intimate lives to decide who qualifies as a parent is more likely to affirm LGBTQ people's chosen families than one that focuses only on whether the adult is related to the child by biology, adoption, or marriage. Second, while same-sex marriage is now available in every state, and second-parent adoption is possible in some states, participation in those institutions varies tremendously by race and class.[195] White wealthy couples are far

[191] Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. STATE U. L. REV. 909, 931 (2019) ("Most of the seminal cases adopting de facto parenthood involve strikingly similar facts: two women in a committed relationship enter a preconception agreement and then raise the child together as equal parents for years.")

[192] See *In re* Custody of H.S.H.-K., 533 N.W.2d at 437.

[193] *See, e.g.*, Conover v. Conover, 146 A.3d 433, 447 (Md. 2016) ("We thus adopt the multi-part test first articulated by the Wisconsin Supreme Court in H.S.H.-K."); V.C. v. M.J.B., 748 A.2d 539, 551-552 (N.J. 2000) ("We are satisfied that [the Wisconsin H.S.H.-K.] test provides a good framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child."); Rubano v. DiCenzo, 759 A.2d 959, 975-76 (R.I. 2000) (finding that "a person who has no biological connection to a child but who has served as a psychological or de facto parent to that child may . . . establish his or her entitlement to parental rights vis-à-vis the child"); *In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005) ("To establish standing as a de facto parent we adopt the following criteria, delineated by the Wisconsin Supreme Court [in H.S.H.-K].").

[194] *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990) (arguing that besides biology and adoption, "[parental] status should also derive from proof of a parent-child relationship that has developed through the cooperation and consent of someone already possessing the status of a legal parent").

[195] White adults are far more likely to be married than Hispanic or Black adults; wealthy Americans are also far more likely to be married than low-income persons. Kim Parker & Renee Stepler, *As Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RSCH. CTR. (Sept. 14, 2017), https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/ [https://perma.cc/2U8R-XC42]. Similarly, adoption is costly and therefore low-income

more likely to marry and or have the thousands of dollars necessary to pursue a second parent adoption.[196] De facto parentage regimes provide a vital backstop for low-income LGBTQ people and people of color, who might not be in a position to establish parental rights through marriage or adoption.

Functional parentage doctrines can therefore be a critically important failsafe to ensure that non-biological LGBTQ parents are not completely excluded from their children's lives. Many states' definitions of a de facto parent extend beyond a co-parent who helped create a child through ART or was an intended co-parent of a child legally adopted by their partner but who the couple always planned to raise together.[197] Instead, romantic partners who assist with caretaking long after a child joins a family can claim they are "de facto parents" in many states.[198] This flexibility means the doctrine can provide protection to a wide range of family arrangements, ensuring that a child is not deprived of a relationship with an adult they view as a psychological parent no matter when that person came into the child's life.[199]

On the other hand, functional parentage regimes fall short of providing certainty or security for the de facto parents or their children. A same-sex parent with a claim to de facto parentage may not be able to get their name on a child's birth certificate; she may struggle to enroll her child in school or consent to medical treatment for the child;[200] if

families are less likely to use adoption to secure their parent-child relationships. *Cf.* Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN STATE L. REV. 1, 36 (2018) (noting that "low-income and African-American same-sex families are in fact less likely to be planned. . . . Planning, it seems, may be a class-based, racially, and regionally selective luxury.")

196 Parker & Stepler, *supra* note 195.

197 *See* CONN. GEN. STAT. ANN. § 46b-59(b) (2021); DEL. CODE. ANN tit. 13, § 8-201 (2021); MONT. CODE ANN. § 40-4-228 (2021); N.H. REV. STAT. ANN. § 168-B:2 (2021); N.Y. DOM. REL. LAW § 70 (2021).

198 *See* ALASKA STAT. ANN. § 25.20.060(a) (2021) (stating that in the event of a custody dispute, a court may "provide for visitation by a grandparent or other person if that is in the best interests of the child"); CONN. GEN. STAT. ANN. § 46b-59(b).

199 *But see* Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. STATE U. L. REV. 909, 912 (2019) (suggesting that de facto parentage doctrines raise due process concerns about the rights of the child's existing parent(s), who might want assistance with childcare but have no intention of granting a grandparent or partner who assists with childcare full parentage with custody rights and arguing that "de facto parenthood is either redundant or unconstitutional").

200 COURTNEY G. JOSLIN, SHANNON PRICE MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 7:1 (2021) (noting that in some states, "a de facto parent has a right to seek visitation or custody, depending on the state, but is not a legal parent and thus may not have an obligation to pay child support, the right

the child's biological or adoptive parent withholds custody or visitation then she may be able to fight successfully for those rights in court, but there is no guarantee of success.[201] Establishing de facto parentage requires a contested custody battle, and there is always a chance that even a litigant with a legitimate claim may not succeed. Even when a parent does prevail, such litigation can take years and impose significant financial and emotional costs.[202] Allowing unmarried same-sex parents to establish parental rights through a de facto parentage regime provides critical protection, but it relegates the non-biological, non-adoptive parent to a lesser, contingent status.[203] The biological or adoptive parent knows she will be viewed as a parent, but the de facto parent cannot be sure her rights will be recognized without a high-stakes custody battle. So while states that recognize a non-biological, non-adoptive same-sex parent as a functional parent do offer some protection to unmarried LGBTQ families, they fall short of offering full equality.

C. No Recognition: Utah

Utah law offers no recognition to same-sex parents unless they marry. The state of Utah permits only married couples and single people to adopt children.[204] Not only are unmarried couples unable to jointly adopt a child, both partners in a live-in sexual relationship are also barred from adopting individually: "A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."[205] So both members of

to make medical or educational decisions, or many other rights granted to legal parents").

[201] *See* Harris, *supra* note 74, at 84 (2017) (noting that de facto parents cannot establish legal parentage "unless and until litigation occurs").

[202] *Id.* (arguing that "the expense and difficulty of litigation almost surely deters some functional parents from [even] making claims that they could theoretically win").

[203] *See* Miller v. Smith, 229 So.3d 148, 152-53 (Miss. Ct. App. 2016), *aff'd*, 229 So.3d 100 (Miss. 2017) (holding that "one standing in loco parentis and a natural parent, the parent is entitled to custody unless the natural-parent presumption is rebutted"); *In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) (finding that although the court did not have the authority to grant custody rights, because the non-biological, non-adoptive spouse was not a "parent" as defined in the statute governing parental rights, since the "parent" must be the adoptive or natural parent under the law, the same-sex couple could petition the court to enter into a shared custody agreement, which would allow custody be given to the spouse as well); Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC., May 31, 2018, at 31-33 (describing how functional parents who establish rights through a de facto parentage doctrine are not always regarded as full legal parents).

[204] UTAH CODE ANN. § 78B-6-117(3) (2021).

[205] *Id.*

gay couple who lived together without being married would be banned from adopting a child under Utah law — they would not even have the option of one partner adopting the child and the other functioning as a parent without the protection of a legal relationship with the child. And in a situation where an unmarried LGBTQ couple were raising a child related to one of them by birth or adoption, there is obviously no way for the other parent to obtain legal rights through adoption — Utah law has no provision for second parent adoptions.[206]

While Utah permits gestational surrogacy, only married couples can enter into an agreement with a surrogate to bear a child.[207] The Utah Supreme Court recently struck down a provision in the law that restricted surrogacy to married heterosexual couples, holding that the U.S. Supreme Court's decisions in *Obergefell v. Hodges* and *Pavan v. Smith* required that same-sex couple be granted all the same benefits of marriage as heterosexual couples.[208] But unmarried couples continue to be ineligible to engage a surrogate to carry their baby.

Utah also does not recognize people who function as parents but are not related to their children by genetics or adoption as legal parents. In *Jones v. Barlow*, the Utah Supreme Court refused to adopt a de facto parent or psychological parent doctrine to allow a non-biological mother to seek visitation with her child.[209]

Keri Jones and Cheryl Barlow were in a committed relationship when they decided to have children.[210] They travelled to Vermont and entered a civil union there (no state permitted same sex couples to marry at the time).[211] They agreed that Barlow would carry their first child, and Jones would get pregnant with their second child later.[212] Together they selected an anonymous sperm donor, and Barlow became pregnant in

206 *Id.* (stating that "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state").

207 UTAH CODE ANN. § 78B-15-801(3) (requiring that "the intended parents shall be married, and both spouses must be parties to the gestational agreement.")

208 *In re* Gestational Agreement, 449 P.3d 69, 84 (Utah 2019) ("Under a plain reading of the statute, a gestational agreement is unenforceable unless at least one of the intended parents is female. This requirement precludes married same-sex male couples from obtaining a valid agreement. As required by Obergefell and Pavan, we hold that section 78B-15-803(2)(b) is unconstitutional under the Fourteenth Amendment's Equal Protection and Due Process Clauses." (citations omitted)).

209 Jones v. Barlow, 154 P.3d 808, 819 (Utah 2007).

210 *Id.* at 810.

211 *Id.*

212 *Id.*

February 2001.[213] Jones attended all prenatal appointments and was present at the birth of their daughter.[214] They gave her the last name Jones Barlow, and raised her together for the first two years of her life.[215] In May 2002, they obtained a guardianship order designating Jones and Barlow as co-guardians of the child.[216] But in October 2003, soon after their daughter's second birthday, Jones and Barlow ended their relationship.[217] Barlow moved out with their child and refused to allow Jones to see her.[218] She also petitioned for an order removing Jones as the co-guardian of their child, and her petition was granted.[219]

Jones sued for custody and visitation, arguing that she had stood "in loco parentis" to the child.[220] The district court agreed and ordered visitation for Jones, but the Utah Supreme Court reversed, ruling that Jones was a legal stranger with no standing to sue for custody or visitation. The court declined to adopt a de facto parent doctrine because "it would be an improper usurpation of legislative authority and would contradict both common law principles and Utah statutory law."[221] Ultimately, the court found that although there was "no reason to doubt the sincerity of Jones' parental feelings for the child," she was not a parent under Utah law.[222] "[W]e are unwilling to craft a doctrine which would abrogate a portion of Barlow's parental rights."[223] As their child's only legal parent, Barlow had absolute authority to terminate Jones' relationship with their child, and Jones had no right to challenge her decision. The 2007 decision is still good law.

Utah same-sex couples who want to have a child and both be recognized as the legal parents of that child have no choice but to get married. As spouses, they can jointly adopt a child, or if one of them gives birth the other can establish legal parentage by filing a step-parent adoption or through the presumption of parentage.[224] A same-sex

213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.* at 819.
222 *Id.*
223 *Id.*
224 UTAH CODE ANN. § 78B-15-204(1) (2021) (stating that "[a] man is presumed to be the father of a child if: (a) he and the mother of the child are married to each other and the child is born during the marriage"). Only the "father," the mother, or a child support enforcement agency can rebut this parental presumption, and the child support

married couple could also jointly adopt a child under Utah law, or retain a surrogate to gestate their child and both be recognized as the child's parents. But if an LGBTQ couple in Utah forgo marriage, there is no way for them both to establish parental rights to a child who is biologically related to only one of them, and they are banned from adopting altogether.

Utah's parentage laws may seem extreme, but it is not the only state to offer no protection to unmarried same-sex parents. Eight other states also make it impossible for unmarried LGBTQ couples to create families with children where both parents have full legal rights to their kids.[225] In Alabama, Arizona, Florida, Louisiana, Michigan, Tennessee, Virginia,[226] Wyoming,[227] and Utah there is no way for a same-sex couple to both establish parental rights over their children unless they marry.[228] Unmarried non-biological parents are treated as legal strangers to their children in these communities, with no right to custody or even visitation.

III. WHAT'S WRONG WITH MANDATING MARRIAGE FOR SAME-SEX PARENTS

There are significant problems with parentage regimes that force LGBTQ people to marry to obtain parental rights. Parentage regimes that force same-sex couples to marry to have rights to their children arguably discriminate on the basis of sexual orientation because they make it far more difficult for LGBTQ parents to establish legally recognized relationships with their children than for heterosexuals.[229]

enforcement agency cannot do so over the "father's" objection. UTAH CODE ANN. § 78B-15-607 (2021). The mother can rebut the presumption only if she shows "by a preponderance of the evidence that it would be in the best interests of the child to disestablish the parent-child relationship." *Id.* Further, a "husband" who "consents to, assisted reproduction by his wife . . . is the father of a resulting child born to his wife." UTAH CODE ANN. § 78B-15-703 (2021).

225 *See supra* Figure 1; *see also infra* Appendix, tbls.4-5.

226 Virginia did enact a law permitting second-parent adoption in 2021 that allows unmarried same-sex parents to establish joint parentage through second parent adoption. *See* Va. Code Ann. § 63.2-1241 (West 2021) (permitting "a person with a legitimate interest" to file a joint petition for adoption with the child's existing legal parent.)

227 Wyoming does permit unmarried couples to retain a surrogate to carry their child and the relevant statute provides that the intended parents of a child born under a gestational surrogacy agreement "shall be deemed to be the mother and father of the child." Wyo. Stat. Ann. § 35-1-410 (West 2021).

228 See *infra* Appendix, tbls.4-5.

229 *See infra* notes 230–263 and accompanying text.

Unfortunately, however, making a constitutional claim of discrimination based on sexual orientation is likely difficult in this context, for reasons I outline below. Similarly, states that require same-sex couples to marry to have joint rights to their children might appear to violate the due process clause by coercing people into marriage. But again, it is difficult to make a constitutional claim along those lines because the Supreme Court has never explicitly recognized a right to not marry, and some of the Court's decisions suggest that states can heavily incentivize marriage without running afoul of the due process clause. On the other hand, exclusionary state parentage regimes may violate LGBTQ couples' due process right to intimate association and the fundamental right to parent in some cases. Parents excluded from a legal relationship with their children may also have a claim for unconstitutional sex discrimination. In this Part I assess each of these claims in turn.

A. Discrimination Based on Sexual Orientation

States that recognize only biological or adoptive parents as parents arguably discriminate based on sexual orientation. While a small percentage of heterosexual couples form families through adoption[230] or use donor gametes to have children,[231] the vast majority of straight couples have biological children whether conceived through sex or via ART.[232] An unmarried heterosexual couple who have a child and raise

[230] 2.9 percent of opposite-sex couples with children have formed their families through adoption. Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html (Sept. 17, 2020) [https://perma.cc/B3XF-9U6R].

[231] Even in situations where an unmarried heterosexual couple uses donor eggs or sperm from a third party to conceive a child, they are far more likely to be recognized as the parents of their child than a similarly situated same-sex couple. In most states a woman who gives birth is the legal parent of the child even if she conceived using a donor egg. *See, e.g.*, *In re* C.K.G., 173 S.W.3d 714, 730 (Tenn. 2005) (finding that "[e]ven though [the birth mother] lacks genetic connection to the triplets, in light of all the factors considered we determine that [the birth mother] is the children's legal mother"). And a man whose partner gave birth to a child they conceived using donor sperm could sign a voluntary acknowledgement of paternity and thus establish himself as the father of the child even though he is not the genetic father.

[232] According to the Centers for Disease Control, ART is used to conceive approximately 2.1 percent of all infants born in the United States every year. *See Assisted Reproductive Technology (ART)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 27, 2021), https://www.cdc.gov/art/state-specific-surveillance/index.html [https://perma.cc/8KBU-QWL8]; *cf.* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 936 (1996) (stating that alternative reproductive technologies "rarely serve to

her together will undoubtably both be recognized as legal parents. The Supreme Court has repeatedly held that natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child."[233] Indeed, the Court has called procreation "one of the basic civil rights of man" and is "fundamental to the very existence and survival of the race."[234] While an unmarried father might not have full parental rights just because of his biological relationship, if he "come[s] forward to participate in the rearing of his child,"[235] his "inchoate" constitutional rights "develop into a fundamental right to be a parent[.]"[236] Today, a very significant percentage of children are born to unmarried parents. In 2014, 40.2 percent of all births were non-marital.[237] In communities of color, an even higher percentage of babies have unmarried parents. 52.9 percent of births to Hispanic mothers were non-marital in 2014, and 70.9 percent to non-Hispanic Black mothers.[238] Unmarried heterosexual parents and their children still face stigma, but states cannot refuse to recognize an unmarried straight couple raising their biological children together as full parents with attendant legal rights. A biological parent who has been actively involved in raising a child clearly has a fundamental right to care and custody that is protected by the Fourteenth Amendment's due process clause.[239]

But most LGBTQ couples cannot create a child that is biologically related to both partners. Instead, same-sex couples form families in which at least one parent is not biologically related to their child. To do so, they rely on ART with donor gametes, or adopt a child. As Doug NeJaime points out, "[a] parentage regime that premises parental recognition on biological connection does not treat gays and lesbians as full and equal parents, even if it treats same-sex and different-sex

subvert conventional family norms" and that they are most frequently used to "complete a traditional nuclear family by providing a married couple with a child").

233 Santosky v. Kramer, 455 U.S. 745, 753 (1982).

234 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

235 Caban v. Mohammed, 441 U.S. 380, 392, 398 n.7 (1979).

236 Lehr v. Robertson, 463 U.S. 248, 261 (1983).

237 U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS, TABLE C2. HOUSEHOLD RELATIONSHIP AND LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS, BY AGE AND SEX: 2015, https://www.census.gov/data/tables/2015/demo/families/cps-2015.html [https://perma.cc/N4XG-DRQK].

238 29.2 percent of births to non-Hispanic white mothers in 2014 were non-marital. Brady E. Hamilton, Joyce A. Martin, Michelle J.K. Osterman, Sally C. Curtin & T.J. Mathews, *Births: Final Data for 2014*, 64 NAT'L VITAL STAT. REP. 1, 40 tbl.14 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf [https://perma.cc/PH62-UHTD].

239 *See* Stanley v. Illinois, 405 U.S. 645, 657-58 (1972).

couples alike."[240] A legal regime like Utah's, that allows only married couples to jointly adopt a child, limits gestational surrogacy to married couples, and does not recognize the unmarried partner of a person giving birth to a donor-conceived child as a legal co-parent also restricts unmarried heterosexual couples from using these methods to form families. But most heterosexual couples are unaffected, while same-sex couples are completely precluded from creating families with children unless they marry.

Of course, while unmarried people having children is common, it is still stigmatized. "Many Americans believe that it is wrong for unmarried persons to have children."[241] Seventy-one percent of participants in a Pew Research Center study believed that the increase in nonmarital births is a "big problem," while forty-four percent said that is always or almost always morally wrong for a woman to give birth to a child outside of marriage.[242] The actual composition of American families has undergone seismic shifts in the past few decades, but deep societal ambivalence toward unmarried people having children has not gone away. Even today, far more Americans consider a married, heterosexual couple raising their biological children to be a "family" than single parents or unmarried couples with children.[243] Significant government funding also continues to be devoted to encouraging people to marry on the belief that marriage will reduce poverty, strengthen communities, and improve outcomes for children.[244] While having and raising children outside of marriage may be increasingly common, large numbers of Americans and official government policy consider doing so to be problematic.

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[240] NeJaime, *Constitution*, *supra* note 18, at 2333.

[241] Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 370 (2011).

[242] *Id.*

[243] PEW RSCH. CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 40 (Nov. 18, 2010), https://www.pewresearch.org/social-trends/2010/11/18/iv-family/ [https://perma.cc/62QC-ZNYT] (finding that ninety-nine percent of Americans consider a married heterosexual couple with children to be a family, while only eighty-six percent see a single parent with children as a family and just eighty percent view an unmarried couple with children as a family).

[244] *See* Liz Schott, Ladonna Pavetti & Ife Floyd, *How States Use Federal and State Funds Under the TANF Block Grant*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 15, 2015), https://www.cbpp.org/research/family-income-support/how-states-use-federal-and-state-funds-under-the-tanf-block-grant [https://perma.cc/2T4A-DFFP] (noting that states reported spending $258 million in 2014 for programs including "a range of healthy marriage initiatives such as parenting skills training, premarital and marriage counseling, and mediation services").

In the past, states have justified discrimination against LGBTQ people as a means to encourage heterosexuals to raise their children within the ideal married family. During the legal battle for marriage equality, states frequently argued that marriage could be restricted to heterosexuals because only they could reproduce *accidentally*.[245] The Indiana Supreme Court, for example, held that allowing only heterosexual couples to marry was justified because "opposite-sex intercourse frequently results in unintended children while same-sex intercourse never will."[246] Limiting marriage to different-sex couples was therefore rationally related to "encourag[ing] heterosexual, opposite-sex couples to procreate responsibly and to have and raise children within a relatively stable, committed relationship."[247] Similarly, New York's highest court found that state was not constitutionally required to allow same-sex couples to marry because they "do not become parents as a result of accident or impulse"[248] and the state was free to use marriage "to create more stability and permanence in the relationships that cause children to be born."[249]

As Courtney Cahill has argued, decisions like these allowed states to discriminate against LGBTQ people in order to regulate heterosexuals.[250] States' ability to force heterosexual people to procreate within marriage is limited by Supreme Court decisions under the due process clause, including those striking down laws denying people access to contraception[251] or stripping unmarried biological fathers of their parental rights.[252] But by banning same-sex marriage states could communicate the normative message that marriage should be procreative, and children should be born within marriage. Rather than coercing heterosexuals directly, states excluded same-sex couples from marriage to encourage straight couples to marry and have children indirectly.[253] LGBTQ equality advocates successfully responded to these arguments not by altogether rejecting the idea that marriage was linked to procreation, but by focusing on the fact that many same-sex couples

[245] *See* Abrams & Brooks, *supra* note 42, at 25 ("In the accidental procreationist view, gay people are simply incapable of making rash or foolish decisions, at least when it comes to having kids.").

[246] Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

[247] *Id.*

[248] Hernandez v. Robles, 855 N.E.2d 1, 7-8 (N.Y. 2006), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[249] *Hernandez*, 855 N.E.2d at 7-8.

[250] Cahill, *supra* note 47, at 72.

[251] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[252] *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[253] *See* Cahill, *supra* note 47, at 71.

do have children, whether through adoption or alternative reproductive technology.[254] Plaintiffs in lawsuits seeking access to marriage frequently highlighted the existence of their children and argued that those children were harmed by their parents' exclusion from marriage.[255] Ultimately, courts agreed that allowing same-sex couples to marry would provide protection for the children of same-sex parents.[256] The states' asserted interest encouraging heterosexual people to procreate withing marriage so as to protect children was not adequate to justify excluding same-sex couples from marriage. Rather, marriage bans "relegated [children with LGBT parents] through no fault of their own to a more difficult and uncertain family life" and "thus harm and humiliate the children of same-sex couples."[257]

Arguably, states that continue to condition parenthood on biology, adoption, or marriage, and thus make it impossible for both partners in an unmarried same-sex couple to establish parental rights to their children are also using same-sex couples to make a normative point about marriage and procreation to heterosexuals. Those states cannot force straight people to marry to obtain parental rights over their children, because the due process clause of the Fourteenth Amendment forbids it. But by making it impossible for same-sex couples both to establish a legally recognized relationship with their kids without marriage, the state can communicate the message that all people ought to marry before having children. *Obergefell* thus becomes a tool to realize what one judge called its "aspiration—a family structure based upon marriage."[258]

Limiting the rights of same-sex couples to communicate a normative message about the ideal family form to heterosexuals would seem to be

[254] *Id.* ("Rather than simply challenge the claim that marriage is inherently procreative, litigants now increasingly argue that same-sex couples are procreative (albeit in a different way), and that they, no less than opposite-sex couples, can satisfy a procreative definition of marriage.").

[255] Attorneys for plaintiffs seeking marriage rights emphasized this not only in their legal arguments, but also in their selection of plaintiffs with children to bring marriage suits. *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. 136, 149 (2015) (noting that "[t]wo-thirds of the plaintiff couples [in *Obergefell v. Hodges*] have children, far higher than the less than eighteen percent of LGB couples generally").

[256] *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1215 (10th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 383 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014) (noting that excluding same-sex couples from marriage harmed their children, while permitting them to marry would offer benefits).

[257] Obergefell v. Hodges, 576 U.S. 644, 668 (2015).

[258] Hawkins v. Grese, 809 S.E.2d 441, 478 (Va. 2018) (ruling that a non-biological mother was not the parent of the child her partner gave birth to during their relationship because the couple had never married).

a form of discrimination based on sexual orientation. Of course, some unmarried straight couples are also affected when a state conditions adoption, surrogacy, or parental rights to non-biological children upon marriage. But exclusionary parentage regimes have a far greater impact on same-sex couples. Even when a straight couple uses donor gametes to create a child, they often can still establish joint parentage, as follows: A man whose partner gives birth to a child they conceived with donor sperm can sign a voluntary acknowledgement of paternity ("VAP") or bring a paternity action to be recognized as the child's father.[259] Assuming his partner does not dispute his paternity, he will be legally recognized as the child's second parent; no DNA test is required to execute a VAP or enter a paternity judgment on consent.[260] A lesbian couple who conceives their child using donor sperm have no such opportunity to establish the non-biological parent's rights. Similarly, if a heterosexual couple uses a donor egg to conceive a child, the woman giving birth will likely be recognized as the child's legal mother notwithstanding the fact that she is not genetically related; in most states the person giving birth is the child's mother unless she is a gestational surrogate.[261] A straight couple who uses a surrogate to gestate their biological child is also likely to be able to be able to establish parentage based on their genetic link. Only unmarried heterosexual couples who create a child using a surrogate and donor gametes or seek to jointly adopt a child are excluded from recognition by parentage regimes that limit surrogacy or joint adoption to married couples.

Nevertheless, the fact that some heterosexuals couples are affected still serves to obscure the extent to which exclusionary parentage

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[259] *See* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 482 (2012) ("[A] man who is not the [child's] biological father can still sign a VAP, since genetic testing cannot be required. If paternity is never challenged, he remains the child's legal father.").

[260] Signing a Voluntary Acknowledgement of Paternity or filing a paternity petition may require declaring under penalty of perjury that the man seeking paternity is the father of the child, however. *See, e.g.*, N.Y. Fam. Ct. Act § 523 (2019) ("[Paternity] [p]roceedings are commenced by the filing of a verified petition, alleging that . . . the petitioner if the petitioner is a person alleging to be the child's father, is the father of the child"); DEL. CODE ANN. tit. 13, § 8-301 (2021) ("The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity"); DEL. CODE ANN. tit. 13, § 8-302 ("An acknowledgment of paternity must . . . [b]e signed, or otherwise authenticated, under penalty of perjury by the mother and by the man seeking to establish his paternity[.])."

[261] *See In re* C.K.G., 173 S.W.3d 714, 730 (Tenn. 2005) (finding that "[e]ven though [the birth mother] lacks genetic connection to the triplets, in light of all the factors considered we determine that [the birth mother] is the children's legal mother").

regimes discriminate against LGBTQ people. A state law that recognizes only biological or adoptive parents as legal parents, and then allows only married couples access to joint or second-parent adoption does not, on its face, discriminate based on sexual orientation. This makes mounting a federal challenge to such a regime difficult, even without considering the Supreme Court's recent rightward tilt. The Court has definitively held that facially neutral state actions that are not intentionally discriminatory but have a disparate impact on a particular class do not violate the Fourteenth Amendment's equal protection clause.[262] Many states' highest courts have similarly refused to permit disparate impact claims under their state constitutions.[263]

B. Due Process Right to Not Marry

Same-sex couples have an established constitutional right to marry.[264] The due process clause also arguably grants all adults, including LGBTQ people, the right to choose for themselves whether to marry or not. "While the outer limits of [the due process right to privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage; procreation; contraception; family relationships; and child rearing and education."[265] While *Obergefell* dealt with same-sex couples' right to marry, the Court's decision in that case also implies a related right to forgo marriage. States opposed to granting same-sex couples the right to marry frequently argued that doing so was constitutional because everyone could marry, they just had to marry a person of the *opposite* sex.[266] But *Obergefell* held that the right to marry was meaningful only if people could marry the

[262] *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

[263] *See, e.g.*, Commonwealth v. King, 372 N.E.2d 196, 207 (Mass. 1977); Maryland State Bd. of Barber Exam'rs v. Kuhn, 312 A.2d 216, 225 (Md. 1973) (noting that state courts' regard disparate impact claims as unconstitutional under their state constitutions).

[264] Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

[265] Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) (citations omitted).

[266] *See* Conaway v. Deane, 932 A.2d 571, 598 (2007), *opinion extended after remand*, (Md. Cir. Ct. 2008), and *abrogated by Obergefell*, 576 U.S. at 609 (ruling that a Maryland law limiting marriage to different sex couples was not unconstitutional because "the marriage statute does not discriminate on the basis of sex . . . [since] limitations on marriage effected by Family Law § 2-201 do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct.").

person they had freely chosen: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[267] While *Obergefell* extolls the many benefits that choosing to marry may bring, including "stability," relief from "loneliness," "nobility and dignity," and "unique fulfillment,"[268] it also makes clear that part of what makes the right to marry meaningful is that individuals have a freedom to decide whom, when, and whether, they will marry. Or, as the Court put it, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[269] Clearly, some people may express their identity by choosing not to marry at all. This too, is a deeply personal decision protected by the due process right to privacy.

Today, many Americans choose to have intimate relationships and form families without being married.[270] Marriage rates in the U.S. are declining overall, with only about half of U.S. adults today being married, versus seventy-two percent in 1960.[271] Similarly, in 1960, seventy-three percent of all children were living in a family with two married parents in their first marriage. But today less than half of children, just forty-six percent, are living in that type of family.[272] This is not all due to people delaying marriage; a significant percentage of Americans who have never married indicate that they have no interest in ever doing so.[273]

When a state makes parental rights for non-biological LGBTQ parents contingent upon marriage, it exacts a harsh penalty from people who exercise their right to forgo marriage. Given the significant autonomy interests at stake in the decision whether to marry or not, LGBTQ people arguably should have the right to decline marriage without facing a denial of their ability to form families or legally-recognized parent-child relationships as a result. The importance of the autonomy interests at stake are even more clear when we examine the race and

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267 *Obergefell*, 576 U.S. at 651-52.

268 *Id.* at 656.

269 *Id.* at 665.

270 *Cf.* Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 313 (2008) (discussing cohabitation).

271 Parker & Stepler, *supra* note 195.

272 PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 17 (2015), https://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [https://perma.cc/W2TM-22YT] [hereinafter PARENTING IN AMERICA].

273 Specifically, fourteen percent of never-married adults say they don't want to get married. Parker & Stepler, *supra* note 195.

class impacts of penalizing people who fail to marry. "[M]arriage is both a privileged status and a status of the privileged."[274] Far more white, affluent Americans marry than do people of color or those with less socioeconomic privilege.[275] The burden of a parentage regime that penalizes LGBTQ people who fail to marry falls hardest on racial minorities and low-income people.[276]

"Marriage rates continue to vary widely by race and ethnicity."[277] Fifty-four percent of white adults were married in 2015, but only forty-six percent of Hispanics and thirty percent of Black people were.[278] Twenty-two percent of Black children are living with two parents who are both in their first marriage, compared with forty-six percent of children overall. [279] Indeed, "[t]he living arrangements of black children stand in stark contrast to the other major racial and ethnic groups."[280] More than half of Black children are living with a single parent, whereas seventy-two percent of white children and eighty-two percent of Asian-American children live with two married parents.[281]

Marriage rates are also "more closely linked to socio-economic status than ever before." [282] Sixty-five percent of adults aged twenty-five or older with a college degree were married in 2015, compared to only fifty percent of those with no education beyond high school.[283] In 1990, sixty percent of adults age twenty-five or older in both groups were married. Indeed, some experts suggest that the racial gap in marriage is largely explained by the disparity African Americans face in employment, earnings, and wealth;[284] "black-white differences in marriage have grown so much since 1960 because economic factors have become increasingly important for marriage formation and stability, and blacks

[274] Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1278 (2015).

[275] *See, e.g.*, JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 99 (2014) (describing how a widening "marriage gap" exists between the poor and the wealthy).

[276] *See* Mayeri, *supra* note 274, at 1278.

[277] Parker & Stepler, *supra* note 195.

[278] *Id.*

[279] PEW RSCH. CTR., PARENTING IN AMERICA, *supra* note 272, at 19.

[280] Fifty-four percent of black children are living with a single parent. *Id.*

[281] *Id.* at 7.

[282] Parker & Stepler, *supra* note 195.

[283] These figures are for people with a four-year college degree. Fifty-five percent of adults age twenty-five or older with some college education were married. *Id.*

[284] *See* R. Kelly Raley, Megan M. Sweeney & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 FUTURE CHILD 5 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4850739/pdf/nihms777225.pdf [https://perma.cc/W4LE-KJXK].

continue to face economic disadvantage." [285] The available data also suggests that affluent same-sex couples are more likely to marry than their poorer counterparts. The U.S. Census Bureau's 2013 American Community survey indicated that same-sex couple who are married are wealthier than those who are not.[286] The median household income of married same-sex couples is twenty-seven percent higher than that of unmarried same-sex couples.[287]

Americans who aspire to marriage also identify economic instability as a reason why they have not wed. [288] Forty-one percent of never married adults who want to marry in the future say that "not being financially stable" is a "major reason" they are not currently married, while twenty-eight percent indicate it is a "minor reason." [289] This is a larger share than those who say they haven't married because they "aren't ready to settle down." [290] As Solangel Maldonado points out, many nonmarital parents do "value marriage — they hold marriage in such high esteem that they choose to delay marrying until they are financially stable and in a stable relationship."[291]

This suggests that, like heterosexuals, LGBTQ people may decide not to wed for a variety of reasons.[292] Some may forgo marriage because they don't feel financially equipped to marry yet, even though they would like to do so in the future. Others may feel ambivalent about (or hostile toward) marriage as an institution, even though they are deeply committed to their partner and children. Marriage was for centuries an avowedly heterosexist institution; it is therefore not surprising that even after *Obergefell* some LGBTQ people might feel uncomfortable participating in in it. Indeed, some members of the LGBTQ community opposed the fight for marriage equality because they viewed it as an

285 *Id.* at 11.

286 Gary J. Gates, *Demographics of Married and Unmarried Same-Sex Couples*, UCLA SCH. L. WILLIAMS INST. (Mar. 2015), https://williamsinstitute.law.ucla.edu/publications/demo-ss-couples-us/ [https://perma.cc/V3U7-YQL2].

287 *Id.*

288 Parker & Stepler, *supra* note 195.

289 *Id.*

290 *Id.*

291 Maldonado, *supra* note 241, at 392.

292 *Cf.* Garrison, *supra* note 270, at 3 ("[C]ohabitation is now a multifaceted and multigenerational phenomenon. It includes young men and women who are sharing living space with a dating partner in order to save money, more committed couples who are testing the strength of their relationship . . . committed couples who view their relationship as marital but have chosen to avoid marriage for practical reasons such as the potential loss of alimony or a surviving-spouse entitlement, and many couples whose motives are mixed . . . .").

effort to domesticate and control gay and lesbian sexuality. As Bill Dobbs famously put it, "Once upon a time, [gay] activists were fighting for the right to be different. Now the fight is for the right to be the same."[293] For Dobbs, the early gay-rights movement was about sexual liberation and securing the right to live an unconventional life.[294] Marriage, on the other hand, was about settling down into monogamous nuclear families and conforming to heterosexual norms.[295] Or, as Michael Warner put it, "[b]etween tricks and lovers and exes and friends and fuckbuddies and bar friends and bar friends' tricks and tricks' bar friends and gal pals and companions 'in the life,' queers have an astonishing range of intimacies."[296] Striving for marriage meant forcing all relationships to be either couplehood or nonsexual friendship. That, he insisted, "is not the way many queers live."[297] Rather, gay people enjoy "a welter of intimacies outside the framework of professions and institutions and ordinary social obligations."[298] Embracing marriage meant abandoning that fluidity and conforming to traditional norms about relationships.

In this view, marriage not only threatens the essence of gay identity, it undermines community solidarity by pulling LGBTQ people away from a cohesive gay culture and into the mainstream, at the expense of LGBTQ political power. Gay and lesbian couples who were cloistered at home enjoying domestic life would no longer stand in solidarity with other LGBTQ people to form an organized, politically powerful community.[299] Of course, choosing to raise children might seem in itself like a conformist, conventional act, and one might assume that parents have less time to enjoy a sexually liberated lifestyle because they are saddled with childcare responsibilities. But LGBTQ parents might

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[293] Bill Dobbs, *Gay Marriage Is a Conservative Cause*, N.Y. TIMES (Apr. 16, 2012), https://www.nytimes.com/roomfordebate/2012/04/16/is-support-for-gay-rights-still-controversial/gay-marriage-is-a-conservative-cause [https://perma.cc/3YS2-GT9U].

[294] Anemona Hartocollis, *For Some Gays, a Right They Can Forsake*, N.Y. TIMES (July 30, 2006), https://www.nytimes.com/2006/07/30/fashion/sundaystyles/30MARRIAGE.html [https://perma.cc/5MTF-7VR7].

[295] *See* Bernstein & Taylor, *supra* note 31, at 14 (describing the fear that "same-sex marriage would result in the containment and control of queer sexuality within monogamous, state-sanctioned relationships").

[296] MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 116 (The Free Press 1999).

[297] *Id.*

[298] *Id.*

[299] *See* Hartocollis, *supra* note 294 (noting that LGBTQ people opposed to marriage "worry that adapting to conventional 'family values' will destroy the cohesion that has made gay men and lesbians a force to be reckoned with, politically and culturally").

nevertheless elect not to marry because they do not perceive marriage as compatible with their specific LGBTQ identity or way of life. For example, some LGBTQ parents have created families that do not include only a couple in a sexual relationship and their joint children — lesbians and gay men have teamed up to conceive and raise children, sometimes with more than two adults playing parental roles, such as when a lesbian couple and a gay couple choose to conceive and raise a child together, with all four adults acting as parents to the child.[300] And LGBTQ people who choose to become parents might still prefer to be non-monogamous or otherwise unconventional in their adult relationships. Such parents may choose not to marry because they are committed to sustaining culturally distinct relationships and identities that marriage would undermine. Again, this would not mean they were not, in fact, parents to their children or that they were uncommitted or bad parents. It would simply mean that, like many heterosexual parents, they decided not to formalize their adult relationship through marriage.

These are intimate issues of identity that people have a right to decide for themselves, without facing excessive government coercion or penalty. The due process clause arguably preserves space for making such "profound personal choices." The Supreme Court's earlier decisions about reproduction, family formation, marriage, and raising children such as in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade* confirm that in such intimate matters, the state cannot force people to pursue a particular life course.[301] Rather, these determinations are protected by a constitutional right to privacy because they:

> "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[302]

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[300] *See* Cathy Herbrand, *Co-Parenting Arrangements in Lesbian and Gay Families: When the 'Mum and Dad' Ideal Generates Innovative Family Forms*, 7 FAMS., RELATIONSHIPS, AND SOC'YS 449, 452-454 (2018) (describing various co-parenting arrangements including a gay couple and a lesbian couple raising a child together).

[301] Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[302] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

The Supreme Court also upheld the right of Americans to exit marriage in a case about access to divorce. In *Connecticut v. Boddie*, the Supreme Court determined that the state of Connecticut could not make it impossible for low-income people to divorce by requiring payment of court fees that they could not afford.[303] Noting that "marriage involves interests of basic importance in our society," the Court held that state statute conditioning divorce upon payment of court fees was unconstitutional as applied to indigent people.[304] The Court emphasized that people could not "liberate themselves from the constraints of legal obligations that go with marriage" without access to the courts to obtain a divorce.[305] But while a case finding that people have a right to divorce might seem to support a right to forgo or avoid marriage, it is important to note that the Court was concerned with facilitating marriage even as it held that people had to be allowed to exit it. The Court noted that without access to court to obtain a divorce, people could not escape "the prohibition against *remarriage*[.]"[306]

Similarly, while the Court has limited states' ability to condition parental rights upon marriage, repeatedly holding that unmarried fathers cannot be denied parental rights if they have formed an established relationship with their children, those decisions fell short of saying that states could not impose some costs for failing to marry before having children.[307] The father's rights cases did not hold that marital and non-marital fathers had to be treated the *same*. To the contrary, while in every state a marital father is a full legal parent when his child is born, that is not the case for non-marital fathers. An unmarried biological father can acquire a due process right to care and custody, but that right is contingent on him acting as a father by providing support and building a relationship after birth.[308] Non-marital fathers are viewed as merely potential "volunteers" who must step forward and act as parents before they have full parental rights.[309]

303 Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

304 *Id.* at 376.

305 *Id.*

306 *Id.*

307 *Cf.* Mayeri, *supra* note 274, at 1280 (noting that in cases regarding discrimination against nonmarital children, "[t]he Court found nothing unconstitutional about discouraging illicit sex and promoting traditional marriage. Rather, to the extent illegitimacy classifications violated equal protection, their infirmity lay in the tenuous relationship between means (punishing innocent children) and ends (deterring adult misconduct).").

308 NeJaime, *Constitution*, *supra* note 18, at 282.

309 *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16 (1991).

In ruling that one biological father who did not form the requisite relationship with his child had no right to notice or consent before the child was adopted, the Court noted that "[t]he institution of marriage has played a critical role . . . in defining the legal entitlements of family members" and so "as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal [i.e., marital] family."[310] The Court did not suggest there was anything constitutionally deficient about that, as a general matter.

The Court's decision in *Obergefell v. Hodges* also arguably cemented marital supremacy, even as it ruled that same-sex couples could not be excluded. Rather than simply hold that state laws excluding gay and lesbian couples from marriage discriminated on the basis of sexual orientation, and were therefore unconstitutional, the Court based its decision overturning the denial of marriage to same-sex couples on both equal protection and due process grounds — since marriage was a fundamental right, and states were denying it to same-sex couples only, such exclusion was unconstitutional. In reaching this conclusion, Justice Kennedy's opinion praised marriage extravagantly, claiming that it "embodies the highest ideals of . . . family."[311] According to the Court, marriage is "essential to our most profound hopes and aspirations" and gives "nobility and dignity" to spouses.[312] By contrast, the decision paints an unflattering picture of single life. People excluded from marriage are "condemned to live in loneliness, excluded from one of civilization's oldest institutions."[313] While marriage "affords the permanency and stability important to children's best interests,"[314] children whose parents cannot marry are humiliated[315] and denied the chance to grow up in what the Court implies is the ideal family form.[316] Many scholars have criticized *Obergefell* for so heavily emphasizing the value of marriage, arguing that in doing so the Court demeaned nonmarital relationships and families. Melissa Murray, for example, suggests that "[i]n praising marriage so lavishly, the decision, by implication, casts life outside of marriage as second-rate and less worthy."[317] Serena Mayeri argues that the Court's opinion "elevates and

310 Lehr v. Robertson, 463 U.S. 248, 256-57 (1983).

311 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

312 *Id.* at 657.

313 *Id.* at 681.

314 *Id.* at 668.

315 *Id.*

316 *See id.*

317 Murray, *supra* note 12, at 1210.

ennobles marriage in terms that implicitly disparage nonmarriage."[318] Many others offered similarly pointed criticism.[319] While recognizing that Obergefell ended a harmful form of de jure discrimination against LGBT people and improved the lives of thousands of same-sex couples who wanted to marry, these scholars lament that the court also may have undermined the rights of unmarried people by further entrenching the supremacy of marriage.[320]

This abiding enthusiasm for marriage and willingness to uphold state laws that favor married parents suggests that the Supreme Court would be unlikely to strike down exclusionary parentage laws on the grounds that they violate people's due process right to remain unmarried. That is all the more true given that a majority of the justices on the Court are now so very conservative. For one thing, there is no established fundamental right to non-marriage equivalent to the fundamental right to marry. Of course, there are good arguments that such a due process right does exist. As Kaipo Matsumura puts it, "[c]hoosing to marry only takes on meaning because of the freedom to choose not to marry."[321] It seems highly unlikely that a state could, consistent with the due process clause, select pairs of citizens at random and force them to wed.[322] But it is a very different thing to say that a constitutional right not to marry bars states from taking other actions to promote marriage, including conditioning benefits upon marriage.[323] The Court has repeatedly affirmed the importance of marriage to family life and indicated that states can prefer that people raise children as part of a "formal family."[324] The proposition that states cannot limit joint adoption, surrogacy, or parental recognition of non-biological parents of donor-conceived children to married couples because doing so violates a

318 Mayeri, *supra* note 17, at 135.

319 *See, e.g.*, Huntington, *supra* note 15, at 23 (noting that Obergefell "reifies marriage as a key element in the social front of family, further marginalizing nonmarital families"); Infanti, *supra* note 11, at 82 ("[Obergefell] has actually set back the movement for equal legal treatment of all regardless of relationship status.").

320 *See* Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 69-70 (2015) ("The problem with Obergefell, however, is that in the majority opinion, Justice Kennedy's adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not.").

321 Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1542 (2016).

322 *See id.* at 1556.

323 *Cf.* Joslin, *The Gay Rights Canon*, *supra* note 7, at 480 (noting that "[j]ust because nonmarriage may be entitled to constitutional protection, however, does not mean that all laws that distinguish between marital and nonmarital families are unconstitutional").

324 Lehr v. Robertson, 463 U.S. 248, 256-57 (1983).

fundamental right not to marry is difficult to square with the Court's prior family law decisions, and the doctrine seems unlikely to move in a more progressive direction given the makeup of the Court.

C. Due Process Right to Intimate Association

Parentage regimes that make it impossible for non-biological LGBTQ parents to secure legal rights to their children while continuing to live together in a sexual relationship without being married arguably burden such parents' due process right to privacy. The Supreme Court has repeatedly held that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[325] Initially, the Court dismissed the idea that same-sex couples have a due process right to engage in sexual relationships. In *Bowers v. Hardwick* the Court held that the state of Georgia could criminally prosecute gay men for having consensual sex without offending the constitution.[326] Indeed, it declared the argument that same-sex couples might enjoy constitutional protection for their relationships "at best, facetious."[327] But the Court reversed itself seventeen years later, ruling in *Lawrence v. Texas* that arresting two men for having consensual sex at home was a violation of the Fourteenth Amendment due process clause.[328] The Court found that "liberty protected by the Constitution allows homosexual persons the right to make [a] choice" to engage in a sexual relationship.[329] This right to intimate association could not be abridged by state criminal laws. Rather, the petitioners were "entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[330]

In reaching this conclusion, the court in *Lawrence* noted that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[331] The opinion thus suggested that the petitioners were long-term partners in a marriage-like relationship, rather than two

[325] Lawrence v. Texas, 539 U.S. 558, 573-74 (2003) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[326] Bowers v. Hardwick, 478 U.S. 186, 186 (1986).

[327] *Id.* at 194.

[328] *Lawrence*, 539 U.S. at 578-79.

[329] *Id.* at 567.

[330] *Id.* at 578.

[331] *Id.* at 567.

people having casual sex, which was not the case.[332] As Katherine Franke notes, the Court "reframe[ed] the question not as about a right to sex but as about a right to a relationship with the person of your choosing."[333] But while *Lawrence* failed to clearly uphold a right to sex itself, it did unequivocally state that LGBTQ people have a liberty right to form an intimate, sexual relationship with a same-sex partner that is protected by the U.S. Constitution.[334] As Melissa Murray puts it, "*Lawrence* interposed a space between marriage and crime that, in the relative absence of legal regulation, offered the possibility of sexual liberty untethered to the disciplinary domains of the state."[335] This is significant because while same-sex couples can now choose to marry if they want, those who do not still retain a fundamental right to engage in a sexual relationship outside of marriage.

States that refuse to allow unmarried same-sex couples to establish legal rights to their children arguably violate this right of intimate association. In *Arkansas Department of Human Services v. Cole*, the Arkansas Supreme Court struck down a state law that banned people cohabiting with a partner to whom they were not married from adopting or fostering a child holding that it violated the plaintiffs' right to intimate association under the Arkansas constitution.[336] Plaintiff Sheila Cole was a lesbian who lived with her partner.[337] She sought to adopt her grandchild who was in foster care because of parental abuse.[338] She was not eligible to adopt because Arkansas had enacted a law by ballot initiative entitled "An Act Providing That an Individual Who is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old."[339] The court held that the state law violated Ms. Cole's right to intimate association under the Arkansas constitution because she could not live with her partner in a

[332] Many commentators have criticized this characterization. *See, e.g.*, Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619-32 (2004) (criticizing *Lawrence* for protecting gays and lesbians only to the extent their relationships look like those of heterosexuals).

[333] Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights, and Responsibilities*, 43 ARIZ. STATE L.J. 1177, 1190 (2011).

[334] *Cf.* Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 139 (2005) (arguing that *Lawrence* provides a basis "to make a moral case for supporting the range of . . . creative ways in which we currently construct our intimate relations outside of marriage").

[335] Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 54 (2012).

[336] Ark. Dep't of Hum. Servs. v. Cole, 380 S.W.3d 429, 431 (Ark. 2011).

[337] *Id.*

[338] *Id.*

[339] *Id.*

sexual relationship and also adopt her grandchild.[340] It found the law in question "penalizes those couples who cohabit and engage in sexual relations by foreclosing their eligibility to have children, either through adoption or by means of foster care."[341]

At that time, Ms. Cole did not have the option to marry her partner because same-sex marriages were banned.[342] But the case did not turn on Ms. Cole's exclusion from marriage; other plaintiffs in the Arkansas lawsuit were cohabiting with heterosexual partners whom they could, presumably, have chosen to marry.[343] Instead the court focused on the substantial burden the law imposed upon the plaintiffs' right to intimate association.[344] While the state argued that the law was constitutional because fostering children or adopting them was a privilege, not a right, the court noted that Ms. Cole and the other plaintiffs were required to give up a fundamental right in order to access that benefit.[345] The court pointed out that "the entire privilege afforded by law to have children in the home, whether adopted or foster children, is denied to cohabiting sexual partners. . . . [T]he penalty imposed is a considerable burden on the right to intimacy in the home free from invasive government scrutiny."[346] As such, the statute was unconstitutional.

The Arkansas statute at issue in Cole was especially restrictive because it barred people from adopting *as individuals* if they lived with a sexual partner to whom they were not married. Only Utah currently has a similar law on the books.[347] But many more states bar unmarried couples from jointly adopting a child,[348] withhold parental recognition from the non-biological parent of a child conceived by an unmarried couple using ART,[349] and do not allow second parent adoption.[350] On their face, these states may not appear to burden intimate association as directly as the Arkansas law at issue in *Cole*. But an LGBTQ person in such a state who wants to form a family with an unmarried partner is

340 *Id.*

341 *Id.* at 437.

342 *See* Jernigan v. Crane, 64 F. Supp. 3d 1260, 1287-88 (E.D. Ark. 2014) (holding Arkansas statute that excluded same-sex couples from marriage unconstitutional).

343 *Ark. Dep't of Hum. Servs.*, 380 S.W.3d at 431-32.

344 *See id.* at 437.

345 *Id.* at 437-38.

346 *Id.* at 437-38.

347 UTAH CODE ANN. § 78B-6-117(3) (2021) (providing that "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state").

348 *See supra* p. 23-25 and accompanying maps.

349 *See supra* p. 23-25 and accompanying maps.

350 *See supra* p. 23-25 and accompanying maps.

faced with the same unconstitutional choice: to remain in the relationship, they must forgo a legally recognized parental relationship with their child.

Examining the case of Utah couple Keri Jones and Cheryl Barlow illustrates this point.[351] When Jones and Barlow decided to start a family together, they discussed each becoming pregnant at some point, with Barlow carrying their first baby and Jones giving birth to a future child.[352] Barlow became pregnant using sperm from an anonymous donor and gave birth to their child, who they gave the surname Jones-Barlow and raised together in their joint home.[353] But while Jones participated in the decision to bring their child into the world, lived with her, and parented her for years, she could not establish a *legally recognized* parent-child relationship. Utah does not permit second parent adoptions,[354] so Jones could not adopt their daughter unless Barlow surrendered her parental rights altogether, which was not feasible since Barlow was a co-parent of their child.[355] The couple did obtain legal guardianship for Jones, but when their relationship later ended, the Utah Supreme Court held that Jones' guardianship gave her no right to custody or visitation with her daughter.[356] Under Utah law, Jones was a legal stranger with no parental rights at all.[357]

Utah's family laws thus forced Jones to make a profoundly difficult choice at the time she and Barlow started their family. She could remain in their intimate relationship and create a child with Barlow, but she would have no legal parental rights (and faced losing her daughter if their relationship ended). Or, she could leave the relationship and have a child without Barlow, getting full parental rights but having no intimate relationship. This is exactly the dilemma that Sheila Cole faced when Arkansas law forced her to give up her relationship with her partner if she wanted to adopt her grandchild.[358] In Ms. Cole's case, the

351 *See* Jones v. Barlow, 154 P.3d 808, 810 (Utah 2007).

352 *Id.*

353 *Id.*

354 UTAH CODE ANN. § 78B-6-117(3) (2021) (stating that "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state").

355 *Cf. In re* Adoption of B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993) (allowing a second parent adoption by a lesbian non-biological mother without the biological mother giving up her parental rights because "when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and unnecessary").

356 *Jones*, 154 P.3d at 810.

357 *Id.* at 819.

358 Ark. Dep't of Hum. Servs. v. Cole, 380 S.W.3d 429, 437-38 (Ark. 2011).

Arkansas Supreme Court determined that compelling her to make such a choice was a "considerable burden on the right to intimacy in the home" that violated that state's right to privacy.[359] *Cole* was decided only under the Arkansas state constitution, but other states' courts have also held that their constitutions have a privacy guarantee that protects intimate association,[360] and *Lawrence v. Texas* established such a right under the U.S. Constitution as well.[361] Unmarried same-sex couples who are deprived of legally recognized rights to their children under state law might claim that the parentage statute unconstitutionally burdens their fundamental right to intimate association under the state or federal constitution.

While the failure to extend parental rights to non-biological LGBTQ parents may not appear to impact intimacy rights as directly as sodomy laws criminalizing gay sex, the burden on privacy here is arguably greater. By the time the Supreme Court decided *Lawrence v. Texas,* sodomy statutes were rarely enforced and when they were, the penalties imposed were minimal.[362] The *Lawrence* petitioners, for example, were sentenced to pay a $200 fine upon conviction.[363] Of course, being dragged from home handcuffed, held in jail, and subject to criminal proceedings is an act of state violence with severe consequences including humiliation, possible loss of employment or housing, and

[359] *Id.*

[360] *See, e.g.*, Gryczan v. State, 942 P.2d 112, 121 (Mont. 1997) (noting that Montana's constitution "affords citizens broader protection of their right to privacy than does the federal constitution"); Campbell v. Sundquist, 926 S.W.2d 250, 261 (Tenn. App. 1996), *abrogated by* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008) ("the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution."); Commonwealth v. Wasson, 842 S.W.2d 487, 491 (Ky. 1992), *overruled on other grounds by* Calloway Cty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557 (Ky. 2020) ("[W]e hold the guarantees of individual liberty provided in our 1891 Kentucky Constitution offer greater protection of the right of privacy than provided by the Federal Constitution as interpreted by the United States Supreme Court.").

[361] Lawrence v. Texas, 539 U.S. 558, 573-74 (2003).

[362] Of course, the existence of sodomy laws imposed an enormous social cost on LGBT people as a class: "the very existence of sodomy laws create[d] a criminal class of gays and lesbians, who [we]re consequently targeted for violence, harassment, and discrimination solely because of their sexual orientation." Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103 (2000). And the fact that the Supreme Court had upheld such laws as constitutional in the disastrous *Bowers v. Hardwick* decision occasioned even greater harm; "*Bowers* was understood by lower courts and the public as a declaration that lesbian and gay people stood outside the protection of the law." Joslin, *The Gay Rights Canon*, *supra* note 7, at 434-35.

[363] DALE CARPENTER, FLAGRANT CONDUCT 150-52 (2012).

long term damage to a person's prospects.[364] These effects are profound, but so are the consequences of being treated as a legal stranger to your own child.[365] Because she chose to remain in a relationship with Cheryl Barlow and have a child with her, Keri Jones had no parental rights to her daughter under Utah law and lost her permanently.[366] Not only did she endure years of painful litigation in which a succession of courts debated the question of whether she had a genuine parent-child relationship with her child, she ultimately lost custody and had no right to ever visit or contact her again. In many states, an unmarried same-sex couple who want to have a child face the same dilemma that Jones and Barlow did: if they stay together and create a child, the non-biological parent will have no legal rights to their child and could lose custody at any time. This arguably imposes an unconstitutional burden on the parent's right to intimate association.

D. Fundamental Right to Parent

State statutes that make it impossible for unmarried same-sex couples to form families with children might also be subject to challenge if they infringe upon people's substantive due process right to parent. Non-biological parents who create children using ART, in particular, may have a viable claim that their fundamental right to parent is violated by state laws that do not recognize them as parents of their children. The notion that parents have a constitutional right to care and custody of their children — a fundamental right to parent — has been entrenched in Supreme Court doctrine since the *Lochner* era. In 1923, the Court held in *Meyer v. Nebraska* that the constitution granted people a right to "establish a home and bring up children" which was a "privilege[] long recognized at common law as essential to the orderly pursuit of

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[364] *See* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 [https://perma.cc/9LTP-Z66H] ("Many people [arrested, even those] who have never faced charges, or have had charges dropped, find that a lingering arrest record can ruin their chance to secure employment, loans and housing.").

[365] A legal stranger has no right to raise or even see a child; such a person has no standing to seek custody or even visitation. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990) (noting that "[c]ustomarily, legal parenthood is an all-or-nothing status. A parent has all of the obligations of parenthood and all of the rights; a nonparent has none of the obligations and none of the rights.").

[366] Jones v. Barlow, 154 P.3d 808, 819 (Utah 2007).

happiness by free men."[367] And two years later, the Court declared that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[368] While the Court came to repudiate most of the substantive due process decisions from that era, *Meyer* and *Pierce* remain good law, and have since been cited many other Supreme Court decisions extolling the right of parents to raise their children. The Court has repeatedly affirmed that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[369] Notwithstanding this longstanding rhetoric about how "the primary role of the parents in the upbringing of their children is now established beyond debate[,]"[370] however, questions about who qualifies as a parent who can exercise these rights have been considerably more fraught.[371] As Doug NeJaime points out, "the critical question with respect to parenthood appears to be not whether the Constitution protects parent-child relationships, but rather which parent-child relationships it protects."

Ironically, some of the earliest cases establishing that parents have a substantive due process right to raise their children were not actually brought by parents.[372] *Meyer*[373] concerned the prosecution of a teacher who had violated a law forbidding foreign language instruction, while in *Prince v. Massachusetts* the custodian of the child in question was her aunt.[374] The Court found the statute at issue in *Prince* was not

[367] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[368] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925) (holding an Oregon law requiring children to attend public school until 8th grade was unconstitutional).

[369] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that Massachusetts statute forbidding children from selling magazines on the street was not unconstitutional as applied to a nine-year-old Jehovah's Witness who wished to sell religious periodicals as required by her faith).

[370] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that Wisconsin compulsory schooling law imposing criminal penalty upon parents who failed to send children to school was unconstitutional as applied to Amish parents who refused to educate children beyond eighth grade).

[371] NeJaime, *Constitution*, *supra* note 18, at 265.

[372] Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 511 (1977) (Marshall, J., concurring) (noting that "the 'private realm of family life which the state cannot enter', recognized as protected in Prince v. Massachusetts was the relationship of aunt and niece") (citation omitted).

[373] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[374] *Prince*, 321 U.S. at 159.

unconstitutional as applied, but that was not because the adult who challenged it was not a legal parent.[375] The Court assumed that Ms. Prince had parental rights to the child she was raising, but held that a child labor law forbidding children from the magazines on the street because it did not improperly infringe on "the private realm of family life which the state cannot enter."[376]

In subsequent cases, however, the Court grappled explicitly with whether to recognize people claiming parental rights as parents. In a series of five cases the Court grappled with whether unmarried biological fathers qualified as parents with due process rights to raise their children.[377] The question arose because traditionally, parental rights and responsibilities followed from marriage:[378] a child born to a married woman was legally the child of the mother and her husband.[379] But a child born to an unmarried woman was deemed "illegitimate," and at common law such a child had no legal parents — he could not even inherit from the mother who gave birth to him.[380] Over time, laws changed so that the mother giving birth was recognized as a legal parent even if she was unmarried, but non-marital fathers were still frequently not recognized as legal parents.[381] *Stanley v. Illinois* concerned a man who had lived with the mother of his children for years and raised them alongside her, but never married her.[382] When the children's mother died, they automatically became wards of the state under Illinois law,

375 *Id.* at 166.

376 *Id.*

377 Michael H. v. Gerald D., 491 U.S. 110, 118 (1989); Lehr v. Robertson, 463 U.S. 248, 261 (1983); Caban v. Mohammed, 441 U.S. 380, 389 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972); *see* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 399 (2012) (describing the significance of this "line of cases focused on the parental rights of unmarried fathers").

378 *See* NeJaime, *Constitution*, *supra* note 18, at 281 ("[F]or much of the nation's history, the Court had assumed that legal fatherhood sprung from marriage, not biology. Parenthood was a legal and social arrangement, not simply a biological fact.").

379 *See* June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INT'L SURV. OF FAM. L. 387, 387 (Bill Atkin & Fareda Banda eds., 2013) (noting that "[t]he marital presumption [that] children born within a marriage are children of the spouses is deeply rooted in Anglo-American law").

380 *Cf.* RON CHERNOW, ALEXANDER HAMILTON 25 (2005) (noting that after founding father Alexander Hamilton's mother died in 1769, a probate court on St. Croix denied him any inheritance from her estate because he was born out of wedlock).

381 Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81-82 (2003).

382 Stanley v. Illinois, 405 U.S. 645, 651 (1972).

and Mr. Stanley lost custody without even a hearing on the matter.[383] The Supreme Court held that this violated his substantive and procedural due process rights; the state could not remove his children from his custody without some proof that he was unfit.[384] While Stanley was not a marital father, he was still a parent whose relationship with his children received due process protection. The Court emphasized that "the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements[.]'"[385]

In subsequent cases the Court made it clear, however, that being a child's biological father was not sufficient to establish a fundamental due process right to parent. As Serena Mayeri notes, "though nonmarital fathers achieved some due process protections, they never won a constitutional guarantee of equal treatment based on sex and marital status."[386] In a trio of cases, the Court reviewed the claims of unmarried biological fathers who opposed the adoption of their children. In *Quilloin v. Walcott*[387] the Court found no constitutional deficiency in a Georgia statute that required only a mother's consent for a child's adoption, unless the parents were married or the father had a court order acknowledging his paternity.[388] In that case, an unwed father who had never lived with the child or legitimated him objected to the child's adoption by the mothers' spouse who had lived with his son for nine years.[389] The Court held that an unwed father's consent to adoption was required only where there was an established parental relationship.[390] While "the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest[,]"[391] Quilloin and his child did not constitute such a "natural

383 *Id.*

384 *Id.*

385 *Id.* (citation omitted).

386 Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2372 (2016).

387 434 U.S. 246, 247 (1978).

388 *Id.* at 255.

389 *Id.*

390 *Id.*

391 *Id.* ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.") (citations omitted).

family."[392] Although he had visited with the child and given him "toys and gifts," Quillion had never "had, or sought, actual or legal custody of his child[.]"[393] Rather, it was the child's mother and stepfather who constituted his "family unit already in existence" that sought "full recognition" through the stepfather's petition to adopt.[394]

By contrast, in *Caban v. Mohammed*, another unwed father who had "lived together as a natural family for several years" with his children did succeed in his constitutional challenge to a New York statute that allowed their adoption without his consent.[395] *Caban* was decided on equal protection grounds — the Court held that the statute at issue discriminated on the basis of sex when it required an unwed mother's consent to adopt her child but offered no such protection to an unwed father.[396] In that case, the two biological parents of the children were similarly situated — they had lived together and jointly raised the children from birth until they were two and four years old.[397] The Court held that to require only the mother's consent to adoption in such a situation was unconstitutional sex discrimination, and did not address Caban's claim that the statute also violated his due process right to parent his children.[398]

In *Lehr v. Robertson*, the Court sought to reconcile its various decisions about the rights of unmarried fathers by emphasizing the difference between situations involving a "developed parent-child relationship" and a mere "potential relationship[.]"[399] The Court explained that "the mere existence of a biological link" does not merit constitutional protection because "the actions of judges neither create nor sever genetic bonds."[400] In order to be recognized as a parent with a constitutional right to care and custody of his children, an unmarried father had to "grasp the opportunity" his biological connection afforded him to "develop a relationship with his offspring[.]"[401] If he did not do

[392] *Id.*

[393] *Id.* at 251, 255.

[394] *Id.* at 255.

[395] Caban v. Mohammed, 441 U.S. 380, 389 (1979) (holding that the statute at issue violated the equal protection clause by discriminating based upon sex because it required the consent of an unmarried mother but not an unmarried father before a child could be adopted. The Court did not address Caban's claim that the statute violated his due process right to parent his children.).

[396] *Id.*

[397] *Id.* at 382.

[398] *Id.* at 391.

[399] Lehr v. Robertson, 463 U.S. 248, 261 (1983).

[400] *Id.*

[401] *Id.* at 262.

so, then he had no constitutional right to consent to his child's adoption, or even be notified that an adoption petition had been filed. Lehr had never lived with his child, provided financial support, or filed a filiation proceeding until she was two years old.[402] He therefore was not a parent with a due process right to care for his child. The Court held a non-marital father looking to exercise a fundamental right to parent needed not just a biological connection but an established relationship with this child.[403]

Arguably, the Court took that position even further in *Michael H. v. Gerald D.*, a case involving the biological father of a child born while her mother was married to another man.[404] Michael H. sought legal parentage and visitation, but California law granted paternity to the mother's husband. At that time, the state had a marital presumption of paternity that could only be rebutted by one of the spouses; as a third party, Michael H. had no right to disturb it.[405] He claiming the statute violated his due process rights, because he was not only his daughter Victoria's biological father, but he had lived with her for several months and developed a relationship with her. But the Supreme Court denied Michael H's challenge to the statute. In a plurality opinion, Justice Scalia wrote that "California law, like nature itself, makes no provision for dual fatherhood."[406] Victoria already had a legal father — her mother's husband, Gerald, whose name appeared on the birth certificate and who wanted to raise her along with his wife "as the offspring of their union."[407] The Court held there was nothing unconstitutional about California choosing to favor Gerald's claim to paternity based upon his marriage to the child's mother over Michael H's claim, which was based on biology plus a developed relationship.[408]

The result of the Court's decision in *Michael H. v. Gerald D.* was that a non-biological parent was recognized as a legal parent, while the genetic father was not. But that was because the Court upheld

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[402] *Id.* at 252.

[403] *Id.* at 248. As Janet Dolgin notes, this requirement continued a longstanding tradition in which "fathers as family members were defined by choice, not nature" and "assume[s] a father's relationship to his children is a cultural creation—and a choice—not the automatic correlate of a biological tie." Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 648 (1993).

[404] Michael H. v. Gerald D., 491 U.S. 110, 118 (1989).

[405] CAL. EVID. CODE § 621 (repealed 1989).

[406] *Michael H.*, 491 U.S. at 118.

[407] *Id.* at 129.

[408] *Id.* at 129-30 ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.").

California's statutory scheme, not because it found that the non-biological father had a constitutional right to parentage. Gerald did not assert a constitutional claim based on his parent-child relationship with Victoria. Rather, the Court considered only whether Michael H. had a due process right to parentage that could overcome the presumption Gerald enjoyed under California law.[409] As Doug NeJaime points out, the Court "upheld the state-law determination of parentage without suggesting that the husband [Gerald] had an interest of constitutional magnitude."[410]

The Supreme Court has not addressed the question of who qualifies as a "parent" with a fundamental due process right to care and custody of their child in decades.[411] While it is clear that a biological parent who conceives and raises a child with their spouse is a legal parent with a fundamental right to raise their child, the question of whether an unmarried non-biological parent raising a child with their same-sex partner has the same constitutional protection is far from clear. Some state courts adjudicating claims from non-biological parents have interpreted these Supreme Court precedents to stand for the proposition that a biological relationship is *necessary* to acquire a due process right to parent (even though it is not sufficient.)[412] For example, in *Russell v. Pasik*, a Florida appellate court rejected a non-biological lesbian mother's claim to parental rights because it concluded that a "biological connection between parent and child" is needed before "the act of assuming parental responsibilities and actively caring for a child is sufficient to develop constitutional rights in favor of the parent[.]"[413] The Supreme Court has never decided a case addressing the parental rights of an unmarried same-sex couple over their children, however. But, as Doug NeJaime explains, a non-biological parent who creates a child with their partner using donor gametes and ART arguably should

[409] *See* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 411-12 (2012) (noting that the Court "clearly understood Michael's attempt to perfect his paternal rights as a challenge to Gerald's rights as a husband functioning as a father within the context of the marital family. And in such a challenge, the winner was obvious.").

[410] NeJaime, *Constitution*, *supra* note 18, at 300.

[411] Higdon, *supra* note 10, at 1485 (noting that the Court "has not weighed in on the issue of parental identity in over a quarter of a century").

[412] NeJaime, *Constitution*, *supra* note 18, at 267 (arguing that state courts have interpreted these "[c]onstitutional precedents . . . [to] have both assumed and produced a model of parenthood that is at base biological").

[413] Russell v. Pasik, 178 So.3d 55, 60 (Fla. Dist. Ct. App. 2015).

qualify for due process protection if they go on to assume parental responsibilities just as an unmarried biological father can.[414]

In the cases about the rights of unmarried biological fathers, the Supreme Court emphasized that being the genetic father of a sexually conceived child created a chance to step forward and assume the responsibilities of parenthood. Because the father helped to create the child, he had "an opportunity that no other male possesses to develop a relationship with his offspring."[415] In the case of a child conceived using donor gametes and ART, however, it is the actions of the intended parents in acquiring the donor sperm or egg and using them to create a baby that leads to the child's existence. The donor who provided gametes does so only on condition that they will not become a parent. And the intended parents select the donor(s) on the same premise — that the donor will not be a parent, while they will. By design, the donor is not a "biological parent" who can build a parent-child relationship with the baby. It is the intended parents who truly cause the child to come into existence, and who therefore may have an "opportunity . . . to develop a relationship" with the child they create.

As noted above, the Supreme Court has emphasized repeatedly that a biological connection to a child is not sufficient to establish parental rights for due process purposes.[416] Rather, an unmarried biological father could only qualify as a parent if he could demonstrate a biological connection plus a relationship with the child. It was the quality of the relationship between the unmarried father and the child that determined whether he would qualify as a parent with constitutional protection.[417] Along the same lines, an intended parent of a child conceived through ART who shows that she grasped the opportunity presented by creating her child to assume a parental role merits due process protection of her parent-child relationship. As Michael Higdon points out, given that thousands of families conceive children using

[414] *See generally* NeJaime, *Constitution*, *supra* note 18, at 269 (arguing that the Supreme Court's cases on unwed fathers "are relevant to the claims of non-biological parents in ways that largely have been overlooked" and when re-examined in light of contemporary family law developments, support a due process right to protection of non-biological parent-child bonds).

[415] Lehr v. Robertson, 463 U.S. 248, 262 (1983).

[416] *See supra* notes 383–415 and accompanying text.

[417] *See* David D. Meyer, *Family Diversity and the Rights of Parenthood*, *in* WHAT IS PARENTHOOD: CONTEMPORARY DEBATES ABOUT THE FAMILY 124, 130-31 ("The unwed father cases make clear that biology is relevant, as is past caregiving, diligence, and the nature of the mother's relationships with the biological father and, if she is married, her husband. However, no single criterion controls the constitutional definition of parenthood." (citations omitted)).

ART and donor gametes every year, "for constitutional parenthood to fully protect the right of contemporary Americans to not only have children, but also to qualify as those children's legal parents, intentional parenthood must be taken into account."[418]

The Supreme Court's decision in *Smith v. OFFER*, however, might seem to cast doubt on whether non-biological parents could assert a constitutional right to parent their children.[419] *Smith v. OFFER* addressed the due process claim of foster parents who argued that they were entitled to a hearing before their foster children were removed from their care. The Court held that the foster parents were not entitled to such due process protection for their relationships with their foster children.[420] In holding that New York's existing procedures were constitutionally adequate, the Court noted that, "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element."[421]

But the Court was also careful to state that "biological relationships are not exclusive determination of the existence of a family."[422] Indeed, Justice Brennan noted that "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."[423] The Court thus did not foreclose the possibility that "individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship."[424] While the case is cited for the proposition that the due process clause protects only biological relationships,[425] that is an over-generalization. The Court in *Smith v. OFFER* was concerned about the specific context in which the claim before it arose; that of foster parents looking to assert a due process right to continued custody of their foster children that could conflict with the

[418] Higdon, *supra* note 11, at 1533.

[419] *See* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 843 (1977).

[420] *Id.*

[421] *Id.*

[422] *Id.*

[423] *Id.* at 844.

[424] *Id.* at 846.

[425] *See, e.g.*, Rodriguez v. McLoughlin, 214 F.3d 328, 337 (2d Cir. 2000) (finding "that any liberty interest arising in the preservation of a biologically unrelated foster family would arise, if at all, only under state law and not under the Due Process Clause itself").

biological parents seeking their return. The case did not turn on the lack of genetic connection between the foster parents and foster children. Rather, the Court noted that unlike "natural" family relationships, which develop "entirely apart from the power of the State,"[426] a foster family relationship comes about because of government action in taking custody of child from her family of origin. "[W]hatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset."[427] The foster parents entered into their role knowing that it was supposed to be temporary and that the government ultimately intended to return the children to their original parents or place them in an adoptive home. Having done so, they could not claim to have a liberty interest in preventing the government from interfering in their relationship with their foster children. As Justice Stewart bluntly put it in his concurring opinion, "[w]ere it not for the system of foster care that the State maintains, the relationship for which constitutional protection is asserted would not even exist."[428]

Similarly, in *Michael H. v. Gerald D.*, the Court was concerned with upholding the traditional, marital family against the claim of a "third party," the biological father who sought to supplant the husband as the second parent of the child.[429] In that situation, the fact that Gerald D. had a biological connection with his child and established a relationship with her was not enough to create a constitutional right to parent because there was another person — the mother's husband, who had also taken the child into his home and raised her as his child. The Court was not willing to recognize Gerald as the child's parent because it would extinguish Michael's parentage.[430]

By contrast, in a case involving a non-biological parent who created a child using donor gametes and ART, there is no other parent whose rights will be taken away if that parent's due process claim is upheld. When a lesbian couple uses donor sperm to conceive a baby, for example, there are only two parents, the biological mother and the non-biological mother. The sperm donor is not a parent since he gave his

[426] *Smith*, 431 U.S. at 845.

[427] *Id.*

[428] *Id.* at 856 (Stewart, J., concurring).

[429] Mayeri, *supra* note 386, at 2372 (noting that, in writing for a plurality of the Court, Justice Scalia "scoffed at the notion that a biological father could invoke constitutional protection for his relationship to a child conceived in an 'adulterous' affair when his parenthood would intrude upon the harmony of an intact marital family").

[430] Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

genetic material only on the understanding that he would not be the parent of any child produced with his sperm. If the non-biological mother is recognized as a parent with a due process right to raise her child, she will join the biological mother as a second parent who could seek custody or visitation if it were in the child's best interests. She does not supplant or replace the biological mother, but is simply recognized as a co-parent based on their shared intent to create and raise a child together.

While the Supreme Court's prior parentage cases do not provide a perfect analogy for unmarried same-sex couples who create families through ART, the Court's focus on the relationship formed between a person asserting parental prerogatives and their child, along with whether there is another parent with a competing claim all weigh in favor of due process protection for non-biological parents who create children using donor gametes. Since such parents intentionally create their children and thus cause them to exist, just as biological fathers of sexually-conceived children do, they too have an opportunity to build a relationship of parental responsibility. And they do so without supplanting any other parent with a competing claim to recognition, like the mother's husband in *Michael H. v. Gerald D.* or the foster children's biological parents in *Smith v. OFFER*.[431] As such, the non-biological parent in an unmarried same-sex couple who conceives using ART should enjoy due process protection for her relationship with her child.

Of course, even if courts did recognize intended parents of children conceived through ART as having a fundamental right to parent their kids, that would not protect unmarried same-sex couples who create families through other means. But it would protect parents like Keri Jones,[432] Sarah Grese,[433] Tina Lake,[434] and Amanda Whitehouse,[435] all of whom created children with a same-sex partner using donor insemination, then raised them together, only to later be deemed legal

[431] *Cf.* NeJaime, *Constitution*, *supra* note 18, at 337 ("Unlike in OFFER, the recognition of non-biological parents [in the context of same-sex families who conceive using ART] does not intervene in a vulnerable family by taking the child from her biological parent. Instead, parental recognition credits the family that the partners jointly and freely formed by leaving the child with both her biological and non-biological parents.").

[432] *See* Jones v. Barlow, 154 P.3d 808, 819 (Utah 2007).

[433] *See* Hawkins v. Grese, 809 S.E.2d 441, 452 (Va. Ct. App. 2018).

[434] *See* Lake v. Putnam, 894 N.W.2d 62, 67 (Mich. Ct. App. 2016).

[435] *See* Delaney v. Whitehouse, No. 2017-CA-001774-ME, 2018 WL 6266774, at *2 (Ky. Ct. App. Nov. 30, 2018).

strangers with no right to a continued relationship with their children years later.

E. Sex Discrimination

In some states, non-biological lesbian parents have established rights to their children by arguing that parentage provisions governing paternity must be applied to women. States that adopted versions of the 1973 Uniform Parentage Act allowed a man to establish parental rights as the "natural father" of a child by receiving the child into his home and holding the child out as his natural child.[436] Notably, the "presumption of paternity" created by a man holding a child out as his natural child could not necessarily be rebutted by evidence that he was not the biological parent of the child. Rather, the fact that he functioned as a parent and represented himself as a parent was sufficient to establish parental rights.[437] In several states, women who had received children into their homes after a partner gave birth or adopted the child sought recognition as parents because they too had "held out" the child as their natural child.[438] Noting that allowing men to establish parental rights by "holding out," but excluding women from the same opportunity was sex discrimination, courts in those states allowed women as well as men to establish parentage using the statutory provisions governing paternity rather than maternity.[439]

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[436] UNIF. PARENTAGE ACT § 4 (4) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1973).

[437] *See* UNIF. PARENTAGE ACT § 4 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1973).

[438] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 667 (Cal. 2005) (since state law required that provisions applicable to determining whether a father and child relationship existed should be used to determine a mother and child relationship "insofar as practicable" a woman could establish parentage if she received the children into her home and held them out as her natural children); *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 588 (Colo. App., 2013) (holding that both men and women can establish parentage on the basis of receiving a child into their home and holding the child out as their own); Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016) (holding that a woman could establish parentage if jointly with the mother she received the children into their home and openly held out the children as their children); *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014) (state's holding out provision "applies equally to women and men").

[439] *See, e.g.*, *In re Parental Responsibilities of A.R.L.*, 318 P.3d at 588 (permitting only men to establish parentage on the basis of holding out would "treat[] presumptive parents differently based on their gender, thus raising equal protection concerns") ; *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014) (state law permitting a person to establish parentage based on holding the child out as their own "applies equally to women and men").

For example, in *Chatterjee v. King*, the New Mexico Supreme Court held that a woman whose lesbian partner had adopted a child from abroad during their relationship was also the child's parent even though they were not biologically related and she had never adopted the child herself.[440] Because Chatterjee "openly held out Child as her natural child from the moment that she and King brought Child to New Mexico from Russia," she could establish a "presumed natural parent and child relationship"[441] under New Mexico's version of the UPA. The statute said that "[a] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child."[442] The court held that Chaterjee had also established parentage by holding out the child as her own, particularly since the statute said that "insofar as practicable," its provisions "applicable to the father and child relationship apply"[443] when determining whether a mother-child relationship exists. But the New Mexico Supreme Court also found that applying the holding out provision to women as well as men was necessary in order "to avoid an interpretation of a statute that would raise constitutional concerns."[444] Noting that a man in same-sex relationship whose partner adopted a child would have been able to establish parentage under the holding out provision, the court noted that it would be sex discrimination to read the statute to prevent Chatterjee from doing the same thing in the exact same situation just because she is a woman.[445]

While LGBTQ parents have been able to establish parental rights through similar "holding out" or other functional parent doctrines in several states,[446] however, other courts have flatly rejected such claims, arguing that paternity provisions cannot be used by women to establish parentage.[447] In *In re Custody of N.S.V.*, a Minnesota appellate court

[440] Chatterjee v. King, 2012-NMSC-019, ¶ 52, 280 P.3d 283, 286 (N.M. 2012).

[441] *Id.*

[442] N.M. STAT. ANN. § 40-11-5(A)(4) (2021).

[443] N.M. STAT. ANN. § 40-11-21 (2021).

[444] *Chatterjee*, 2012-NMSC-019, ¶ 18, 280 P.3d at 288.

[445] *See Chatterjee*, 2012-NMSC-019, ¶ 9, 280 P.3d at 286.

[446] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (holding that a woman could establish parentage based on receiving a child into her home and holding the child out as her own); *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 588 (Colo. App. 2013) (same); Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016) (same); *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014) (same).

[447] *See, e.g.*, White v. White, 293 S.W.3d 1, 9 (Mo. Ct. App. 2009) (holding that a non-biological lesbian mother could not establish parentage under the state's paternity statute because if the statute were read to address a child's mother rather than father,

refused to recognize a lesbian non-biological mother as a legal parent to her fourteen and twelve-year-old children.[448] Terri Ann Bischoff and her partner Linda J. Vetter conceived three children through donor insemination, all of whom Vetter carried. They lived together as a family until the oldest child was five and the younger twins were three, when Bischoff and Vetter ended their relationship. Thereafter Bischoff co-parented the children, with "one overnight [visit] per week and every other weekend," and she paid $500 in child support each month.[449] But five years later, Vetter terminated visitation. Bischoff filed suit, asking that the court "adjudicate her as the 'intended and legal parent' of the children," and grant her joint physical and legal custody.[450] Bischoff grounded her claim in Minnesota's parentage act, which provided that "[a] man is presumed to be the biological father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child."[451] She argued that because she had lived with her children when they were born and held them out as her own, she could establish legal parentage under the statute. But the court disagreed, noting that the holding out provision applies only when a man receives a minor child into his home and "holds out the child as his *biological* child."[452] As such, the court found that the parentage act and presumptions of paternity was intended "to find the biological father" of a child and thus could not form the basis for a parentage claim by a woman.[453] Rather, the court found that the purpose of the paternity presumption was to "create a functional set of rules that point to a likely father," and so "to find the biological father and then to adjudicate that person the legal father."[454] The court also rejected Bischoff's claim that the statute discriminated against her on the basis of sex, finding that "the procedure established by the parentage act is substantially related to serving the government's interest because it creates a system by which those having a legal relationship with the child may be identified and declared the parent of the child, which

then it would only apply "with respect to a child who has no presumed [mother]" and in this case the petitioner's former partner was the biological mother).

[448] *In re* Custody of N.S.V., 2019 WL 4412722, at *3 (Minn. Ct. App. Sept. 16, 2019), *review denied* (Nov. 27, 2019) (holding that "the district court did not err in determining that the holding-out presumption does not apply to Bischoff and that she cannot establish legal parentage under the parentage act").

[449] *Id.* at *1.

[450] *Id.*

[451] MINN. STAT. § 257.55, subdiv. 1(d) (2021).

[452] *Id.*

[453] *In re Custody of N.S.V.*, No. A18-0990, 2019 WL 4412722, at *3.

[454] *Id.* (citations omitted).

allows for the enforcement of the legal duties and responsibilities imposed by the parent and child relationship."[455] Bischoff was awarded "third-party visitation" with her children but denied recognition as their parent.[456]

The Minnesota court's reasoning is flawed, however. First, while the language of the statute may require that a man "hold the child out as his biological child," the holding out provision does not require a genetic connection between the alleged father and child for him to establish parentage.[457] A man who lived with a child and represented to others that he was the father of that child would be able to establish paternity under the statute even if he were not the biological parent. The only reason Bischoff could not do so was her sex. If a straight couple used donor sperm to conceive a child, the male partner could use the Minnesota statute to establish paternity if he held their child out as his own. But Bischoff could not, because she is a woman. The statute thus clearly discriminated against her based on sex. The court upheld the constitutionality of the paternity statute because it "serves an important government interest and is substantially related to serving that interest."[458] But excluding Bischoff from establishing parentage did not advance the state's interest in the "enforcement of the legal duties and responsibilities imposed by the parent and child relationship."[459] Because Bischoff was deemed to not be her children's legal parent, she would not be legally obligated to continue paying child support or otherwise ensuring their needs were met. Rather than having two parents who were legally responsible for them, Bischoff's children were left with only one. Limiting the holding out doctrine only to men was not necessary to advance the state interest identified by the court; in fact, it undermined it. The court's refusal to read the statute so as to avoid sex discrimination against Bischoff, or to offer her another appropriate remedy, therefore appears incorrect.

Significant sex discrimination persists in the parentage laws of many jurisdictions in other forms as well. One practice that gives men a significant advantage in being able to establish legally recognized parent-child relationships to their children is that of Voluntary

[455] *Id.* at *4.

[456] *Id.* at *5.

[457] MINN. STAT. § 257.55, subdiv. 1(d) (2021) (requiring only that "while the child is under the age of majority, [the presumed father] receives the child into his home and openly holds out the child as his biological child").

[458] *In re Custody of N.S.V.*, 2019 WL 4412722, at *3.

[459] *Id.* at *4.

Acknowledgements of Paternity or VAPs.[460] In every state, when a child is born to an unmarried man and woman, the couple can elect to sign a VAP form in order to establish the man's paternity and have him named as the child's father on the birth certificate.[461] In fact, VAPs are used to establish paternity for the vast majority of children with unmarried parents.[462] In 2016, 1.6 million children were born to unmarried mothers.[463] Fathers executed 1.1 million VAPs that same year.[464] These forms are typically executed at the hospital soon after the child's birth. Hospital staff then file the VAP form with the state vital statistics office, and the man signing the VAP is listed as the father on the child's birth certificate. VAPs developed in the context of child support enforcement; since 1993 federal law has required states to adopt a VAP system as a condition of receiving public assistance funding.[465] In most states, VAPs are only supposed to be executed by a child's biological father.[466] No

[460] *See generally* Harris, *supra* note 259, at 478 (arguing that lesbian co-parents should be allowed to voluntarily acknowledge parentage as men can).

[461] *See* Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 571 (2019).

[462] *See* Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 615 (2005) (noting about fifty-eight percent of children born to unmarried parents have paternity established through a VAP in the hospital after birth); *see also* Cynthia Osborne & Daniel Dillon, *Dads on the Dotted Line: A Look at the In-Hospital Paternity Establishment Process*, 5 J. APPLIED RSCH. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 1 (2014) ("[T]he vast majority of unmarried parents [are] now establishing paternity in the hospital voluntarily.").

[463] Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman, Anne K. Driscoll & Patrick Drake, *Births: Final Data for 2016*, 67 NAT'L VITAL STAT. REP. 1, 31 (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_01.pdf [https://perma.cc/9RUK-LNYN].

[464] U.S. DEP'T HEALTH & HUM. SERVS., OFF. OF CHILD SUPPORT ENF'T, ANNUAL REPORT TO CONGRESS FY 2016, at 214 (2016), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fy_2016_annual_report.pdf [https://perma.cc/PH9R-FTFM].

[465] *See* 42 U.S.C. § 666(a)(5)(C)(i) (2018).

[466] *See, e.g.*, ALA. CODE § 26-17-301 (2021) ("The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity"); ALASKA STAT. ANN. § 18.50.165 (2016) (providing that a "man [who] is the natural father of the child" may sign a VAP). *But see* UNIF. PARENTAGE ACT § 301 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017) (states adopting the 2017 UPA, including California, Vermont, and Washington also allow the intended parents of a child conceived using alternative reproductive technology to sign a VAP even if they are not biologically related to the child. UPA states that "an intended parent [of a child conceived using ART], or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child"); CAL. FAM. CODE § 7573 (2021); VT. STAT. ANN. tit. 15C, § 301(a) (2021); WASH. REV. CODE ANN. § 26.26A.200 ("A woman who gave birth to a child and an alleged genetic father of the child, intended parent under RCW

proof of a genetic relationship is required in order to complete the form, however. Indeed, federal law forbids states from requiring a blood test in order to complete a VAP.[467] And the fact that later DNA testing shows a man who executed a VAP is not the genetic father of the child does not negate his parental rights.[468] Once executed, "a signed voluntary acknowledgment of paternity is considered a legal finding of paternity"[469] that is equivalent to a court order of parentage. It can only be rescinded within sixty days of execution, or challenged in court "on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger[.]"[470] In essence, "VAPs provide a clear, inexpensive way to establish a legal parent-child relationship for all purposes between the man and the child and to identify the man and woman as the child's coparents."[471]

Some scholars have criticized the VAP system precisely because they are so easy to sign.[472] These commentators express concern that a man may execute a VAP without realizing that doing so effectively waives his right to genetic testing and so could subject him to liability for support

26.26A.600 through 26.26A.635, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child.").

467 *See* 45 C.F.R. § 302.70(a)(5)(vii) (2021); Sherri Z. Heller, *Policy Interpretation Question 03-01: Paternity Disestablishment,* U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF CHILD SUPPORT ENF'T (Apr. 28, 2003), https://www.acf.hhs.gov/css/policy-guidance/paternity-disestablishment [https://perma.cc/SBQ3-6MT4].

468 *See, e.g.*, People *ex rel.* Dep't of Pub. Aid v. Smith, 818 N.E.2d 1204, 1205-06 (Ill. 2004) ("At issue is whether a man who signs a voluntary acknowledgment of paternity can later seek to undo the acknowledgment on the basis of DNA test results. We hold that he cannot."); *In re* Gendron, 950 A.2d 151, 152-53 (N.H. 2008) (holding that a man who had signed a VAP at the time of his child's birth was a legal parent with standing to seek custody, notwithstanding the fact that a subsequent DNA test showed he was not genetically related to the child). *But see* TEX. FAM. CODE ANN. § 161.005(c) (2021) (allowing a man to petition to terminate parental rights when he signed a VAP based on misrepresentation and genetic tests exclude him as the biological father).

469 42 U.S.C. § 666(a)(5)(D)(ii) (2018).

470 § 666(a)(5)(D)(iii).

471 Harris, *supra* note 259, at 478.

472 *See, e.g.*, Gibbs, *supra* note 461, at 579 ("VAPs are easy to execute, highly susceptible to error, and difficult to undo. These characteristics sometimes create a perfect storm that results in a man who is not a child's biological father being established as a child's legal father and assuming the attendant rights and responsibilities instead of the biological father."); Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 MICH. J. GENDER & L. 67, 97 (2014) (noting that VAPs are often executed soon after birth and so "a signatory might feel coerced into signing the acknowledgment and may not have the opportunity to ask or obtain accurate information about his genetic ties to the newborn baby").

to a non-biological child.[473] There is some empirical evidence, however, that parents signing VAPs do not want genetic testing and decline it even when it is offered at no cost.[474] The underlying purpose of the VAP program is to facilitate the efficient collection of child support by clearly identifying the parents responsible for the child as soon as possible after birth. Given that states are prohibited from requiring blood testing before allowing a man to execute a VAP, clearly the program is not overly concerned with accurately identifying the child's genetic parents. Rather, it is designed to clearly assign parental rights and support responsibility as quickly and efficiently as possible to the man who has stepped forward as a parent for the child.

VAPs provide unmarried heterosexual couples with an accessible, easy way to establish joint parental rights to their children. There is no need for such families to go to court to obtain a paternity judgment. Simply by signing a form in the hospital, the mother and father of a nonmarital child can establish his parental rights and ensure he is named on the baby's birth certificate. And while the VAP program is ostensibly for biological fathers to establish paternity, the reality is that a non-genetic father can also establish paternity by signing an acknowledgement. The fact that a DNA test might later show that he is not the biological parent will not automatically void the VAP or strip him of his parental rights. While some states will allow a man who signed a VAP to challenge it later upon proof that he is not the child's biological father, he must bring a court action to do so.[475] And courts in

[473] *See, e.g.*, June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1067 (2003) (noting that some commentators argue genetic testing should be required before legal parenthood is established); Anne Greenwood, Comment, *Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas*, 35 ST. MARY'S L.J. 421, 451 (2004); Niccol D. Kording, *Little White Lies that Destroy Children's Lives–Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J.L. & FAM. STUD. 237, 239 (2004).

[474] *See* Harris, *supra* note 259, at 477 (noting that "an independent Michigan study found that even when free genetic testing was offered to anyone who requested it before signing a VAP, only a tiny fraction asked for the test. Of the 1,660 nonmarital births examined, a VAP was signed in seventy-eight and a half percent, and only in 112 cases was a genetic test requested").

[475] *See, e.g.*, ALA. CODE § 26-17-308 (2021) ("[A] signatory of an acknowledgment of paternity may commence a proceeding to challenge the acknowledgment" based on "scientific evidence presented by the defendant that he is not the [biological] father." The federal statute includes a provision for a "challenge" of an acknowledgment of paternity after the period for rescission of a voluntary acknowledgment of paternity has elapsed. Such a collateral attack is to be limited to a challenge based on alleged "fraud, duress, or material mistake of fact," and according to 42 U.S.C. § 666(a)(5)(c)(D)(iii), must be made "in court[.]").

many states have held that a man who signed a VAP may not set it aside even upon proof that he is not the genetic father of the child.[476] As Leslie Joan Harris points out, "even in states that allow a VAP to be set aside upon proof that the man is not the child's biological father, a man who is not the biological father can still sign a VAP . . . [and, if] paternity is never challenged, he remains the child's legal father."[477]The 2017 UPA expands the VAP program beyond the federal law's requirements, changing it to a Voluntary Acknowledgement of Parentage that can be signed by people of any gender identity.[478] In addition to (alleged) biological fathers, the 2017 UPA permits intended parents of a child conceived through assisted reproductive technology to sign a VAP, even if they are not genetically related to the child.[479] To date, only ten states have adopted this new formulation, but proposed laws based on the 2017 UPA are pending in several states.[480] This is a very positive development, because it permits unmarried LGBTQ couples to obtain

476 *See In re* Support Obligation of Do Rego, 620 N.W.2d 770, 771 (S.D. 2001) (noting that genetic evidence is not sufficient to rebut the presumption of legitimacy after the sixty-day statute of limitations unless the challenger shows fraud, duress or material mistake of fact); DNW v. Dep't of Fam. Servs., 154 P.3d 990, 993-94 (Wyo. 2007) (noting that legislature intended to make paternity finding final).

477 Harris, *supra* note 259, at 482.

478 *See* UNIF. PARENTAGE ACT § 301 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017) (stating that "[a] woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child"); *see also id.* § 301 cmt. (noting that Section 301 of the Uniform Parentage Act was revised to "permit an intended parent under Article 7 or a presumed parent to sign an acknowledgment of parentage, in addition to an alleged genetic parent" in order to "ensur[e] that the act applies equally to children born to same-sex couples"); Joslin, *Nurturing Parenthood*, *supra* note 10, at 603 (2018) (noting that "the UPA (2017) expands the classes of people who can establish parentage through state voluntary acknowledgment processes (VAP)").

479 *See* UNIF. PARENTAGE ACT § 301 (stating that "[a] woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child"); *see also id.* § 301 cmt. (noting that Section 301 of the Uniform Parentage Act was revised to "permit an intended parent under Article 7 or a presumed parent to sign an acknowledgment of parentage, in addition to an alleged genetic parent" in order to "ensur[e] that the act applies equally to children born to same-sex couples"); Joslin, *Nurturing Parenthood*, *supra* note 10, at 603-04 (noting that "the UPA (2017) expands the classes of people who can establish parentage through state voluntary acknowledgment processes (VAP)").

480 *See 2017 Parentage Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f [https://perma.cc/85UN-26LU] (noting that legislation modelled on the 2017 UPA has been introduced in Nevada, Pennsylvania, and Massachusetts).

joint parental rights to their children swiftly, cheaply and with certainty as soon as their baby is born. Rather than living with doubt that their parental rights would not be recognized (or worse, certainty that they would not be), parents able to sign a VAP can be sure that their rights are secure.

One could also argue that failing to permit women to sign VAPs when their partners give birth to a child the couple intends to raise together is sex discrimination. This is harder to see if we think of the VAP as a means of identifying a child's biological parent. In most cases, the lesbian partner of a woman giving birth will not be genetically related to their child.[481] It might therefore seem nondiscriminatory to restrict VAPs to men. But there are situations in which such a woman would have a genetic link to her child. If she were a transgender woman, and the couple had used her sperm to conceive, then she would be the genetic parent. Similarly, some lesbian couples conceive using reciprocal in-vitro fertilization ("IVF"), in which eggs are taken from one partner, fertilized with donor sperm, and then the resulting embryo is placed in the other partner's uterus. In such situations, the partner of the woman giving birth is the genetic parent rather than the birthing mother. No court has addressed the question of whether excluding a woman in either of these situations from signing a VAP constitutes sex discrimination. But courts have held that women who are genetic parents cannot be excluded from bringing paternity actions solely because they did not give birth. In *T.V. v. New York State Department of Health*, a New York court held that a woman whose genetic child was born to a gestational surrogate was entitled to an order of parentage under the state's paternity statute, because to exclude her from coverage would likely be unconstitutional sex discrimination.[482] Similarly, in *D.M.T. v. T.M.H.*, the Florida Supreme Court held that the state's assisted reproductive technology statute was unconstitutional as applied to a lesbian woman who provided her eggs for reciprocal IVF in order to create a child with her partner.[483] After their relationship ended, the partner who gave birth argued that she was the child's sole legal parent. The court found that it would "pose a substantial equal protection problem to deny an unwed genetic mother the ability to assert parental rights after she established a parental relationship with

[481] Not in every case. If the couple conceived through "reciprocal IVF," and the partner donated her egg, or if she is a trans woman and the couple used her sperm to conceive, then the partner would be a genetic parent despite being a woman.

[482] T.V. v. N.Y. State Dep't of Health, 929 N.Y.S.2d 139, 140-41 (App. Div. 2011).

[483] D.M.T. v. T.M.H., 129 So.3d 320, 339 (Fla. 2013).

her child while allowing an unwed genetic father to do so."[484] Similarly, there would seem to be a strong argument that forbidding women who are genetically related to their children from signing VAPs after their partners give birth constitutes sex discrimination.

Even situations where the lesbian partner excluded from signing a VAP is not a genetic parent appear potentially problematic. As noted above, men can sign VAPs whether or not they are actually the genetic father of their children.[485] While the program is ostensibly designed to identify biological parents, no proof of genetic parentage is required, and indeed states are forbidden from asking for it. If an unmarried heterosexual couple used donor sperm to conceive a baby, the intended father could sign a VAP after the baby was born and legally establish his paternity. After sixty days, the VAP could not be challenged other than upon a showing of mistake of fact, duress, or fraud. Assuming the intended father knew that his partner had become pregnant using donor sperm and elected to sign the VAP, he could not claim mistake of fact, duress, or fraud.[486] There would be no basis for challenging his paternity after the sixty-day period. He would be the legal father with full parental rights to the child. But a similarly situated lesbian intended co-parent would have no access to the VAP program to establish her parental rights after her partner gives birth to their baby conceived using donor sperm.

In cases involving the establishment of parent-child relationships, however, the Supreme Court has often held that women and men can be treated differently because of biological differences in their creation of children. In *Tuan Anh Nguyen v. I.N.S.*, for example, the Court upheld different requirements for unmarried mothers and fathers to transmit U.S. citizenship to their children born abroad.[487] Under the federal statute in question, a child born to an unmarried mother could establish a parent-child relationship and transmit citizenship by giving birth to the child,[488] but a child with an unmarried U.S. citizen genetic father would not automatically obtain citizenship at birth unless the man

[484] *Id.*

[485] *See supra* notes 472–483 and accompanying text.

[486] *Cf.* Matzuk v. Price, 828 S.E.2d 252, 256-57 (Va. Ct. App. 2019) (holding that a woman's petition to disestablish paternity was correctly granted when her former partner had signed a VAP while uncertain about whether he was the genetic father of her child and DNA testing showed he was not; a material mistake of fact existed since he had acted "in part upon an error, misconception, or misunderstanding." Presumably, had Matzuk been certain that he was not the genetic father of the child when he signed the VAP, no such material mistake of fact would have existed).

[487] Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 63 (2001).

[488] *See* 8 U.S.C. § 1409(c) (2018).

either legitimated the child, swore under oath that he is the child's father, or obtained a court order of paternity before the child turned eighteen.[489] The court held that this statute did not violate the Fifth Amendment because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood."[490] Since a woman's genetic relationship is clear upon giving birth, but a man's is not, the Court held that "[t]he imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective."[491]

But in a recent case, the Supreme Court revisited the issue of differing requirements for mothers and fathers to transmit U.S. citizenship, and this time did not find that biological differences between men and women justified treating mothers and fathers differently. In *Sessions v. Morales-Santana*, the Supreme Court examined a provision of the Immigration and Nationality Act that required U.S. citizen parents to reside in the United States for a set period before their children who were born abroad would automatically become U.S. citizens at birth.[492] Unmarried fathers had to have five years' U.S. residence prior to a child's birth in order to transmit citizenship. But unmarried mothers could pass on citizenship if they had resided in the U.S. for only one year.[493] Noting that "[l]aws granting or denying benefits 'on the basis of the sex of the qualifying parent,' . . . differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee"[494] the Court found that the "stunningly anachronistic" statute at issue was unconstitutional.[495]

The government had claimed that the distinction between children born to unmarried U.S. citizen mothers and fathers was justified to ensure that children born abroad had a connection to the United States "of sufficient strength to warrant conferral of citizenship at birth."[496] Treating mothers and fathers differently was justified by biological differences, the government argued, because an unmarried mother is the only legal parent of a child at birth, whereas an unwed father is always a second parent and thus has to compete with the child's mother for influence upon the child. In prior cases, the Court had accepted

489 *See* § 1409(a).

490 *Tuan Anh Nguyen*, 533 U.S. at 63.

491 *Id.*

492 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017).

493 *See id.*

494 *Id.* at 1689.

495 *Id.* at 1693.

496 *Id.* at 1694-95.

similar arguments about asserted biological difference between men and women to justify disparate treatment of unmarried mothers and fathers.[497] But in this case the court rejected the government's claims as mere sex stereotyping — reflecting an unfounded belief that unwed citizen fathers "would care little about, and have scant contact with, their nonmarital children."[498] Such an overbroad generalization could not form the basis for a legitimate government interest, the Court found. "Lump characterization of that kind . . . no longer passes equal protection inspection."[499] The Court made clear that statutes discriminating on the basis of sex are to be viewed suspiciously, even in the context of parental rights over nonmarital children, "*Morales-Santana* clarifies that laws that distinguish between the rights of nonmarital mothers and fathers will be subject to the same skeptical review as other gender-based classifications."[500]

This might suggest that state laws allowing only men to establish parent-child relationships through voluntary acknowledgments of paternity also unconstitutionally discriminate based on sex.[501] At a time when ever-more children are conceived using ART with donor sperm or eggs, it is no longer accurate to say that only men need an efficient, accessible means to acknowledge parentage and establish parental rights. And given that being biologically related to a child is not required to sign a VAP, excluding female non-biological parents is not justified when non-biological male parents can and do execute VAPs. The *Morales-Santana* court also suggested that statutes must be evaluated according to contemporary realities, rather than historical tradition. A gender-based distinction cannot pass muster, the Court explained, unless it "serve[s] an important governmental interest today."[502] The Court noted that *Obergefell* "recognized that new insights and societal understandings can

[497] *See, e.g.*, Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 63 (2001) (upholding another provision of the Immigration and Nationality Act that imposed more burdensome requirements on unmarried citizen fathers versus citizen mothers to transmit citizenship to their children born abroad because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination [of parenthood] with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective"); Kristin A. Collins, *Equality, Sovereignty and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 173 (2017) ("[T]he gender-differentiated regulation of derivative citizenship has proved largely resistant to constitutional challenge . . . .").

[498] *Morales-Santana*, 137 S. Ct. at 1684.

[499] *Id.* at 1695.

[500] Collins, *supra* note 497, at 199.

[501] *See* NeJaime, *Nature*, *supra* note 74, at 2333-34.

[502] *Morales-Santana*, 137 S. Ct. at 1690.

reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[503] Similarly, while limiting VAPs to men might have seemed common sensical in 1993 when the federal mandate was imposed, the discriminatory nature of such a limitation is clear today. Ten states have followed the 2017 UPA, which allows all parents of children conceived through ART to sign VAPs. That further suggests that there is no important government interest in limiting them to men only.

IV. THE FUTURE OF MANDATORY MARRIAGE

Obergefell v. Hodges changed family law for LGBTQ Americans in myriad ways. In opening marriage to same-sex couples nationwide, the Supreme Court's decision allowed LGBTQ people to marry in jurisdictions that might never have permitted same-sex unions otherwise. Notwithstanding Justice Roberts' claim that the Court's decision cut off a democratic debate that might ultimately have resulted in marriage equality absent a court order,[504] many states might never have permitted same-sex marriage without the Court ruling that they were required to do so by the U.S. constitution.[505] The decision thus created freedom to marry for couples who had previously been excluded, opening up a range of benefits that facilitate co-parenting, including access to joint adoption, step-parent adoption, and the marital presumption of parentage. Access to these parental rights that come with marriage are especially critical for same-sex parents who generally cannot create biological children together through sex and must rely on adoption or assisted reproductive technology to form families with children. But even after *Obergefell* opened marriage to same-sex couples, those who fail to marry are still marginalized. In eight states, which I have described as hostile to unmarried same-sex couples and their children, such families have no means whatsoever to create a legal relationship between the non-biological parent and their child. The

[503] *Id.* (citing Obergefell v. Hodges, 576 U.S. 644, 673 (2015)).

[504] *See Obergefell*, 576 U.S. at 710-11 (Roberts, C.J., dissenting).

[505] *See* Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, 14 L. & SEXUALITY 135, 138 (2005) (noting that while some states at the time were winning state challenges to marriage equality, "as many as a dozen states [were] targeted by opponents of equality as part of their own ideological campaign and for their political purposes could enact further *discriminatory* measures this year, compounding the second-class citizenship gay Americans already endure"); *see also* Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html [https://perma.cc/L75B-VJLT] (noting that when the ruling in Obergefell came down, there were still thirteen states that had bans on same sex marriage).

Obergefell decision clearly advanced the effort to end anti-LGBTQ discrimination in family law, but same-sex couples are still far from being treated equally.

As noted above, the continued marginalization of LGBTQ parents raises serious constitutional questions. Non-biological parents' exclusion from any means to secure a legally recognized relationship with their children violates both their due process and equal protection rights. But as a practical matter, parents looking to assert those constitutional claims will face an uphill battle given how conservative the federal judiciary and particularly the Supreme Court became during the Trump administration.[506] Expanding legal protection for same-sex couples through federal litigation seems very unlikely when so many Supreme Court justices are hostile to expansive interpretations of the Fourteenth Amendment's guarantees.[507] As in the early years of the fight for marriage equality, advocates may need to look to state constitutions to develop the rights of LGBTQ couples rather than bringing federal claims that are subject to Supreme Court review.[508] Many state courts have ruled that their constitutions have more expansive due process and equal protection guarantees than those recognized at the federal level.[509] Same-sex parents might therefore be able to successfully challenge exclusionary parentage regimes under their states' constitutions even if Supreme Court victories are unlikely. Marriage equality advocates pursued exactly that strategy and won access to marriage for same-sex couples in states across the country through litigation under state

[506] Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (last updated Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/HFN3-XYJ3].

[507] *See* Masood Farivar, *Conservative Supermajority on U.S. Supreme Court Asserts Itself*, VOICE OF AM. (July 4, 2021, 10:21 PM), https://www.voanews.com/usa/conservative-supermajority-us-supreme-court-asserts-itself [https://perma.cc/98TD-KTJR] (noting that "the U.S. Supreme Court has moved decidedly to the right following three key appointments by former President Donald Trump").

[508] *See* Wolfson, *supra* note 505, at 139.

[509] *See, e.g.*, Gryczan v. State, 942 P.2d 112, 121 (Mont. 1997) (noting that Montana's constitution contains a broader right to privacy than the federal constitution); Campbell v. Sundquist, 926 S.W.2d 250, 261 (Tenn. App. 1996), *abrogated by* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008) (holding the Tennessee Constitution has a more extensive right to privacy than the U.S. Constitution); Commonwealth v. Wasson, 842 S.W.2d 487, 491 (Ky. 1992), *overruled on other grounds* by Calloway Cty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557 (Ky. 2020) (finding the Kentucky Constitution offers a greater protection of the right of privacy than the federal constitution); Figueroa Ferrer v. E.L.A., 7 P.R. Offic. Trans. 278 (P.R. 1978) (holding that the Puerto Rican Constitution's right to privacy and human dignity affords a right to no-fault divorce).

constitutions.[510] It was only after several states' courts had recognized a right to same-sex marriage under their state's constitution that advocates sought to vindicate the right nationally in federal courts.[511]

LGBTQ equality advocates have also successfully expanded same-sex parents' rights through state law reform.[512] State legislatures have acted to safeguard LGBTQ couples and their children by reforming parentage laws to be more inclusive, including by adopting the 2017 UPA which eliminates much of the discrimination unmarried same-sex couples face

[510] *See, e.g.*, Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014) (holding that state law excluding same-sex couples from marriage violated the state constitution); Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (same); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (same); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (same).

[511] *See* HELEN M. ALVARÉ, JACK M. BALKIN, WILLIAM N. ESKRIDGE, JR., KATHERINE FRANKE, ROBERT P. GEORGE, SHERIF GIRGIS, JOHN C. HARRISON, ANDREW KOPPELMAN, MELLISA MURRAY, DOUGLAS NEJAIME, REVA B. SIEGEL, CATHERINE SMITH & JEREMY WALDRON, WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX MARRIAGE DECISION 28-36 (Jack M. Balkin ed., 2020) (describing how LGBTQ rights advocates challenged exclusionary marriage laws in various states' courts claiming that they violated the state's constitutions, thereby winning marriage equality in Massachusetts, Connecticut, Iowa, and California, along with civil unions in Vermont and New Jersey before attacking state same-sex marriage bans in the federal courts: "The preferred strategy of the . . . marriage equality advocates . . . was fairly clear. They would slowly but surely work through as many state legislatures, administrative agencies, and state judicial systems as they could in the hopes of gradually creating a national majority of thirty or so states that recognized same-sex marriage, offered civil unions with all of the rights of marriage, or provided domestic partnerships with many marriage-like features. Then, they believed, it would be time to approach the federal courts.").

[512] *See, e.g.*, *GLAD Applauds Update to Maine Law Allowing Expanded Access to Voluntary Acknowledgments of Parentage*, GLAD (June 11, 2021), https://www.glad.org/post/glad-applauds-update-to-maine-parentage-law [https://perma.cc/P3T3-35Z7] (noting that LGBTQ rights organizations encouraged Maine to expand its Voluntary Acknowledgement of Parentage ("VAP") program to include all parents of children conceived through assisted reproductive technology, not just men); *With Unanimous Bipartisan Support, Connecticut Senate Approves Landmark Parentage Bill to Extend Equal Access to Legal Protections for All Children*, GLAD (May 21, 2021), https://www.glad.org/post/connecticut-senate-passes-landmark-parentage-bill [https://perma.cc/QQB5-VU8U] (noting that a coalition of LGBTQ advocacy organizations in Connecticut successfully campaigned for passage of the Connecticut Parentage Act, which incorporates many 2017 Uniform Parentage Act provisions into state law). GLBTQ Advocates and Defenders ("GLAD") led advocacy efforts successfully urging state legislatures to adopt the UPA in Vermont, Rhode Island, Maine, and Connecticut, and has also worked on similar legislation mending in Massachusetts. Yale Law School Professor Douglas NeJaime was the primary drafter of Connecticut Parentage Act and advocated for its passage along with students in a law school clinic. *Clinic Celebrates a New Parentage Law*, YALE L. SCH. (June 2, 2021), https://law.yale.edu/yls-today/news/clinic-celebrates-new-parentage-law [https://perma.cc/W7QG-2M4L].

in parentage law.[513] In the past three years, six states have passed some version of the UPA.[514] If the UPA were enacted in every state, unmarried LGBTQ families would have equal access to surrogacy, gamete donation, and ART nationwide. They would be able to conceive children through ART without one partner's parentage being in question. Same-sex couples would no longer be required to marry to form legally recognized relationships with their children. The difficulty, of course, is that states hostile to LGBTQ equality may be very reluctant to adopt the UPA or other progressive parentage legislation.[515]

Ultimately, greater uniformity in this area of family law might be achieved through Congressional action. Laws governing the establishment of paternity and child support vary very little from state to state because federal law requires all jurisdictions to adopt uniform rules and procedures to qualify for federal public assistance funding.[516] Prior to the imposition of these federal mandates, states used to have very different statutes of limitation regarding child support, for example.[517] Now every state allows a child support action to be filed anytime before a child turns eighteen.[518] Similarly, every state has a VAP program because the Family Support Act of 1988 "encouraged" the states "to establish and implement a simple civil process for voluntarily acknowledging paternity[,]"[519] and subsequently states were required to implement a VAP program by the Omnibus Budget Reconciliation

513 *See* Joslin, *Nurturing Parenthood*, *supra* note 10, at 598-99 (noting the influence and adoption of the past UPA variations, as well as how the new UPA helps address the needs of same-sex couples by eliminating gender-based distinctions and the protecting functional parent-child relationships).

514 *See 2017 Parentage Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f [https://perma.cc/85UN-26LU] (reporting that Connecticut, Maine, Rhode Island, California, Vermont, and Washington have enacted the 2017 Uniform Parentage Act).

515 *See* Julie Moreau, *Changes to State Parenting Laws Help Fill Gaps for Same-Sex Couples*, NBC NEWS (Aug. 1, 2020, 1:30 AM PDT), https://www.nbcnews.com/feature/nbc-out/changes-state-parenting-laws-help-fill-gaps-same-sex-couples-n1235517 [https://perma.cc/V4XS-SXAH] (noting that some states have not adopted sections of the UPA and instead have written parentage laws that exclude same-sex parents or passed "religious exemption" laws excluding same-sex couples from parental rights).

516 *See* Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 56-58 (2010).

517 *See* Clark v. Jeter, 486 U.S. 456, 458-59 (1988) (showing that Pennsylvania had a six-year statute of limitations before federal Child Support Enforcement Amendments of 1984).

518 42 U.S.C. § 666(5)(A) (2018).

519 Family Support Act of 1988, H.R. 1720, 100th Cong. § 111(c), 102 Stat. 2343, 2350 (codified as amended at 42 U.S.C. § 668).

Act of 1993.[520] Congress could similarly act to protect LGBTQ families by requiring states to adopt legislation recognizing the parental rights of non-biological parents of children conceived through ART, for example.[521] This would ensure that such children had the benefits of a legally-recognized relationship with their parents, including access to child support, just as sexually conceived children do. Without such reforms, same-sex couples in many states will have to marry if they want both partners to have parental rights to their children. LGBTQ people who fail to marry will face the dire consequences that flow from being a legal stranger to their children, including the threat of permanent separation from them.

CONCLUSION

Achieving marriage equality in *Obergefell v. Hodges* was an enormous victory for the LGBTQ rights movement. But in many states, same-sex couples are not just free to wed; those who want to be parents are *required* to marry in order to establish legal rights to their children. This situation is extremely troubling because states are penalizing same-sex parents who fail to marry to make a normative point about the centrality of marriage to child-rearing, but unmarried heterosexual couples can have and raise children together without being denied parental rights. Same-sex couples marginalized based on class and race are most likely to be harmed by these exclusionary parentage regimes because wealthy white couples are far more likely to marry than low-income folks or people of color. But while a constitutional claim on the basis of sexual orientation discrimination or a fundamental right not to marry is challenging under current doctrine, non-biological LGBTQ parents denied legal rights to their children because they failed to marry may be able to assert claims based on their fundamental right to intimate association, fundamental right to parent, and sex discrimination. Such arguments could be effective in persuading state courts to uphold the rights of non-biological same-sex parents, and getting state legislatures to enact laws protecting them. Ultimately, advocates could seek Congressional mandates for uniform laws recognizing non-biological

[520] Omnibus Budget Reconciliation Act of 1993, H.R. 2264, 103d Cong. § 13721(b)(2)(C), 107 Stat. 312, 659 (codified as amended at 42 U.S.C. § 666).

[521] *Cf.* Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 44 (2010) (arguing that Congress should pass a statute requiring states to "adopt simple, administrative procedures, including hospital-based programs, pursuant to which a birth mother would be permitted to sign an affidavit of parentage regarding a child born through assisted reproduction").

parents of children conceived through ART as legal parents. If such efforts are successful, LGBTQ parents may ultimately be protected by more pluralistic, inclusive parentage laws.

APPENDIX: FIFTY STATES PARENTAGE LAWS

Table 1

State	Classification (No protection, Limited or Uncertain Protection, Full Protection)	State allows joint adoptions by unmarried couples	Authority
Alabama	No Protection	No. State law does not authorize joint adoption by unmarried couples.	ALA. CODE § 26-10A-5.
Alaska	Limited Protection	Yes. Statute does not explicitly authorize joint adoptions by unmarried couples but judges in the state grant such petitions.	ALASKA STAT. ANN. § 25.23.020; https://www.creativefamilyconnections.com/us-surrogacy-law-map/alaska/ [https://perma.cc/7JDA-XT3M].
Arizona	No Protection	No. State law does not authorize joint adoption by unmarried couples.	ARIZ. REV. STAT. ANN. § 8-103(A).
Arkansas	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	ARK. CODE ANN. § 9-9-204.
California	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	CAL. FAM. CODE § 8600; Sharon S. v. Superior Court, 31 Cal. 4th 417, 446, 73 P.3d 554, 574 (2003).
Colorado	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	COLO. REV. STAT. ANN. § 19-5-202.
Connecticut	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	CONN. GEN. STAT. § 45a-724 (a)(3) (2020).
Delaware	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	DEL. CODE. ANN. TIT. 13 § 903(2)(d) ("A nonmarried couple petitioning jointly" are eligible to adopt a child).

District of Columbia	Full Protection	Yes. Jurisdiction allows unmarried couples to jointly adopt children.	D.C. CODE ANN. § 16-302.
Florida	No Protection	No. Only married couples can jointly adopt children.	FLA. STAT. ANN. § 63.042.
Georgia	Limited Protection	Yes. State allows unmarried couples to jointly adopt children.	GA. CODE ANN. § 19-8-3.
Hawaii	Limited Protection	No. Only married couples can jointly adopt children.	HAW. REV. STAT. ANN. § 578-1 (2020).
Idaho	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	IDAHO CODE § 16-1501.
Illinois	Limited Protection	Yes. State allows unmarried couples to jointly adopt children.	750 ILL. COMP. STAT. ANN. 50/2 (2015); Petition of K.M., 274 Ill. App. 3d 189, 205, 653 N.E.2d 888, 899 (1995) ("[T]he Act must be construed to give standing to the unmarried persons in these cases, regardless of sex or sexual orientation, to petition for adoption jointly.").
Indiana	Limited Protection	Yes. Jurisdiction allows unmarried couples to jointly adopt children.	In re Infant Girl W., 845 N.E.2d 229 (Ind. Ct. App. 2006).
Iowa	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	IOWA CODE § 600.4.
Kansas	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	KAN. STAT. ANN. § 59-2113.
Kentucky	Limited Protection	No. Only married couples can jointly adopt children.	KY. REV. STAT. ANN. § 199.470(2) (2020).

Louisiana	No Protection	No. Only married couples can jointly adopt children.	LA. CHILD. CODE ANN. art. 1198 (2020); Costanza v. Caldwell, 167 So.3d 619 (La. 2015).
Maine	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	ME. STAT. 18-C § 9-301 (2020); In re Adoption of M.A., 930 A.2d 1088, 1098 (Me. 2007).
Maryland	Full Protection	Yes. Jurisdiction allows unmarried couples to jointly adopt children.	MD. CODE ANN., FAMILY LAW, § 5-3B-13.
Massachusetts	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	MASS. GEN. LAWS ch. 210; Adoption of Tammy, 416 Mass. at 212, 619 N.E.2d at 319 (1993) (finding "[c]learly absent [in the Massachusetts act] is any prohibition of adoption by two unmarried individuals like the petitioners.").
Michigan	No Protection	No. State law does not authorize joint adoption by unmarried couples.	MICH. COMP. LAWS ANN. § 722.24.
Minnesota	Limited Protection	State law does not explicitly authorize joint adoption by unmarried couples.	MINN. STAT. ANN. §§ 259.20 (2); 259.21 (7); 259.22 (1); *cf.* In re Adoption of T.A.M., 791 N.W.2d 573, 579 (Minn. Ct. App. 2010) (stating that Minnesota's adoption statute "might reasonably lead one to conclude that Minnesota law allows adoption by any number or arrangement of persons, [but] that conclusion is not inevitable.").
Mississippi	Limited Protection	No. State law does not authorize joint adoption by unmarried couples and prohibits "[a]doption by couples of the same gender."	MISS. CODE ANN. § 93-17-3(5).
Missouri	Limited Protection	State law does not explicitly authorize	MO. ANN. STAT. § 453.010.

		joint adoption by unmarried couples.	
Montana	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	MONT. CODE ANN. § 42–1–106.
Nebraska	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	NEB. REV. STAT. ANN. § 43-101 (1) (2020); Stewart v. Heinman, 892 N.W.2d 542 (Neb. 2017).
Nevada	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	NEV REV. STAT. §§ 127.030 (noting one or more adults may petition the district court of any county in this state for leave to adopt a child. Each prospective adopting adult and each consenting legal parent seeking to retain his or her parental rights must be a joint petitioner); 127.020 (noting a minor child may be adopted by one or more adults subject to the rules prescribed in this chapter).
New Hampshire	Limited Protection	Yes. State law does authorize joint adoption by unmarried couples.	N.H. REV. STAT. § 170-B:4 (2021 changes).
New Jersey	Limited Protection	Yes. State law does authorize joint adoption by unmarried couples.	N.J. STAT. ANN. § 9:3-43.
New Mexico	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	N.M. STAT. ANN. § 32A-5-11 (2020); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).
New York	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	N.Y. DOM. REL. LAW § 110.
North Carolina	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	N.C. GEN. STAT. ANN. § 48-2-301.
North Dakota	Limited Protection	No. State law does not authorize joint	N.D. CENT. CODE ANN. 14-15-03.

		adoption by unmarried couples.	
Ohio	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	OHIO REV. CODE ANN. § 3107.03 (2020).
Oklahoma	Limited Protection	Yes. State allows unmarried couples to jointly adopt children.	OKLA. STAT. tit. 10, § 7503-1.1 (2020).
Oregon	Limited Protection	Yes. State allows unmarried couples to jointly adopt children.	OR. REV. STAT. § 109.309.
Pennsylvania	Limited Protection	No. State does not allow joint adoption by unmarried couples.	23 PA. STAT. AND CONS. STAT. ANN. §§ 2311; 2312; 2711(a)-(b); 2903 (2020); In re Adoption of R.B.F., 803 A.2d 1195, 1197 (Pa. 2002) (finding there is no language explicitly preventing unmarried same-sex partners from jointly adopting).
Rhode Island	Full Protection	Yes. State law does not explicitly authorize joint adoption but courts have permitted them.	15 R.I. GEN. LAWS ANN. § 15-7-4; *Parenting, Second Parent Adoption, Rhode Island,* GLAD, https://www.glad.org/overview/second-parent-adoption/rhode-island/ (last visited Feb. 22, 2022) [https://perma.cc/2TNX-38LN].
South Carolina	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	S.C. CODE ANN. § 63-9-60 (A)(1) (2020).
South Dakota	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	S.D. CODIFIED LAWS § 25-6-3 (2020).
Tennessee	No Protection	No. State law does not authorize joint adoption by unmarried couples.	TENN. CODE ANN. §§ 36-1-115(a)-(c), 36-1-117(f) (2020); In re Adoption of N.A.H., No. W2009-01196, 2010 WL 457506, at *2 (Tenn. Ct. App. 2010) (the court considered the issue but did

			not address because the petition was withdrawn).
Texas	Limited Protection	Yes. State allows unmarried couples to jointly adopt children.	TEX. FAMILY CODE ANN. §§ 101.024, 101.025, 160.201, 162.001(a)-(b), 162.002(a) (2020); Goodson v. Castellanos, 214 S.W.3d 741, 752 (Tex. App. 2007) (holding that a joint adoption of a child by an unmarried same sex couple was valid).
Utah	No Protection	No. Only married couples can jointly adopt children. Unmarried persons who cohabitate with a partner are also prohibited from adopting individually.	UTAH CODE ANN. § 78B-6-117(3).
Vermont	Full Protection	Yes. State allows unmarried couples to jointly adopt children.	VT. STAT. ANN. tit. 15A § 102(a) (2020).
Virginia	No Protection	No. State law does not authorize joint adoption by unmarried couples.	VA. CODE ANN. §§ 63.2-1201, 63.2-1201.1(D) (2020).
Washington	Full Protection	Statute does not explicitly authorize or prohibit joint adoption by unmarried couples.	WASH. REV. CODE ANN. § 26.33.140.
West Virginia	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	W. VA. CODE ANN. § 48-22-201.
Wisconsin	Limited Protection	No. State law does not authorize joint adoption by unmarried couples.	48 WIS. STAT. § 48.82 (2020).
Wyoming	No Protection	No. State law does not authorize joint adoption by unmarried couples.	WYO. STAT. ANN. § 1-22-104 (An adoption petition "may be filed by any single adult or jointly by a husband and wife who maintain their home together, or by either the

			husband or wife if the other spouse is a parent of the child.").

Table 2

State	State allows second parent adoptions by unmarried partners	Authority
Alabama	No. State does not allow second parent adoptions by unmarried partners.	ALA. CODE § 26-10A-5.
Alaska	Yes. Statute does not explicitly authorize joint adoptions by unmarried couples but judges in the state grant such petitions.	ALASKA STAT. ANN. § 25.23.020; *Gestational Surrogacy in Alaska*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/alaska/ (last visited Feb. 22, 2022) [https://perma.cc/7JDA-XT3M].
Arizona	No. State law does not authorize second parent adoptions by unmarried partners.	ARIZ. REV. STAT. ANN. § 8-103(A).
Arkansas	No. State law does not authorize second parent adoptions by unmarried partners.	ARK. CODE ANN. § 9-9-204.
California	Yes. State allows second parent adoptions by unmarried partners.	CAL. FAM. CODE § 8600; Sharon S. v. Superior Court, 31 Cal. 4th 417, 446, 73 P.3d 554, 574 (2003).
Colorado	Yes. State allows second parent adoptions by unmarried partners.	COLO. REV. STAT. ANN. § 19-5-211(d.5)(I).
Connecticut	Yes. State allows second parent adoptions by unmarried partners.	CONN. GEN. STAT. § 45a-724; In re Adoption of Baby Z., 45 Conn. Supp. 33, 57, 699 A.2d 1065, 1077 (Super. Ct. 1996).
Delaware	Yes. State allows second parent adoptions by unmarried partners.	DEL. CODE ANN. tit. 13, § 732, 903; In re Hart, 806 A.2d 1179, 1179 (Del. Fam. Ct. 2001).
District of Columbia	Yes. State allows second parent adoptions by unmarried partners.	In re M.M.D., 662 A.2d 837, 859 (D.C. 1995) (finding that "courts have extended 'stepparent' exceptions under 'cut off' provisions to cover unmarried, though personally committed, same-sex couples").

Florida	State law does not explicitly authorize second parent adoptions, but attorneys and advocates indicate that Florida judges will grant second parent adoptions	FLA. STAT. ANN. § 63.042.
Georgia	Yes. State allows second parent adoptions by unmarried partners.	Bates v. Bates, 317 Ga. App. 339, 730 S.E.2d 482 (2012).
Hawaii	No. State does not allow second parent adoption by unmarried partners.	HAW. REV. STAT. ANN. § 578-1 (2020).
Idaho	Yes. State law permits any adult to adopt any minor child.	IDAHO CODE § 16-1501.
Illinois	Yes. State allows second parent adoptions by unmarried partners.	750 Ill. COMP. STAT. ANN. 50/2 (2015); Petition of K.M., 274 Ill. App. 3d 189, 205, 653 N.E.2d 888, 899 (1995).
Indiana	Yes. State allows second parent adoptions by unmarried partners.	In re Adoption of M.M.G.C., 785 N.E.2d 267 (Ind. Ct. App. 2003).
Iowa	Yes. Statute does not explicitly permit second parent adoption but courts have granted them	Schott v. Schott, 744 N.W.2d 85, 88 (Iowa 2008).
Kansas	No. State does not allow second parent adoption by unmarried partners.	In re I.M., 48 Kan. App. 2d 343 (2012).
Kentucky	No. State does not allow second parent adoption by unmarried partners.	J.S.B. v. S.R.V., No. 2021-SC-0008-DGE, 2021 WL 4487638, at *1 (Ky. Sept. 30, 2021) ("[O]ur adoption statutes require that the parental rights of both biological parents be terminated upon the grant of an adoption with the single explicit exception of a stepparent adoption.").
Louisiana	Yes. State allows second parent adoptions by unmarried partners.	Ferrand v. Ferrand, 221 So.3d 909 (La. App. 5 Cir. 2016).

Maine	Yes. State allows second parent adoptions by unmarried partners.	In re Adoption of M.A., 930 A.2d 1088, 1098 (Me. 2007).
Maryland	Yes. State allows second parent adoptions by unmarried partners.	MD. CODE ANN., FAMILY LAW § 5-3A-29 (a); *see also* Conaway v. Deane, 401 Md. 219, 335-36, 932 A.2d 571, 641-42 (2007) (Raker, J. concurring in part and dissenting), *opinion extended after remand*, (Md. Cir. Ct. 2008), *and abrogated by* Obergefell v. Hodges, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (noting that "Maryland also recognizes 'second-parent adoptions,'" and "Maryland's trial courts have granted same-sex couples 'second-parent adoptions' and have noted that such adoptions are in the best interests of the child) (citing In re Petition of D.L.G. & M.A.H., No. 95–179001/CAD, 2 MFLM Supp. 21 (1997) (Cir. Ct. Balt. City, June 27, 1996)); Letter from Kathryn M. Rowe, Assistant Att'y Gen., Office of the Att'y Gen., Sharon Grosfeld, Delegate, Maryland Gen. Assemb. (June 9, 2000).
Massachusetts	Yes. State allows second parent adoptions by unmarried partners.	Adoption of Tammy, 416 Mass. at 212, 619 N.E.2d at 319 (1993).
Michigan	No. State does not allow second parent adoption	MICH. COMP. LAWS ANN. § 722.24.
Minnesota	Yes. State law does not explicitly authorize second parent adoptions, but caselaw indicates judges have granted second parent adoptions	In re Adoption of T.A.M., 791 N.W.2d 573, 579 (Minn. Ct. App. 2010) (refusing to vacate a second-parent adoption granted to an unmarried lesbian couple because petition to vacate was untimely but declining to decide whether Minnesota law permits such adoptions).
Mississippi	No. State does not allow second parent adoption by unmarried paretners	MISS. CODE. ANN. § 93-17-3 (4) (2020).
Missouri	State law does not explicitly authorize second parent adoptions, but attorneys in the state indicate judges have	MO. ANN. STAT. § 453.010, *Gestational Surrogacy in Missouri*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/missouri/ (last visited Feb. 22, 2022) [https://perma.cc/RK4T-FL53].

	granted second parent adoptions.	
Montana	Yes. State allows second parent adoptions by unmarried partners.	MONT. CODE ANN. § 42-4-302(2).
Nebraska	No. State does not allow second parent adoption by unmarried partners.	NEB. REV. STAT. § 43-101 (2) (2020); In re Adoption of Luke, 640 N.W.2d 374 (Neb. 2002) (denying second parent adoption by unmarried same-sex couple).
Nevada	Yes. State allows second parent adoptions by unmarried partners.	NEV REV. STAT. § 127.030.
New Hampshire	Yes. State allows second parent adoptions by unmarried partners.	N.H. REV. STAT. § 170-B:4 (2021).
New Jersey	Yes. State allows second parent adoptions by unmarried partners.	Matter of Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 3, 666 A.2d 535, 536 (App. Div. 1995).
New Mexico	State law does not explicitly permit second parent adoptions by unmarried partners but judges within the state have granted such adoptions.	N.M. STAT. ANN. § 32A-5-11 (2020); *see also* Griego v. Oliver, 316 P.3d 865, 874 (N.M. 2013) (noting that one of the plaintiffs "plans to initiate a second-parent adoption" to establish parentage of her unmarried partner's adopted child).
New York	Yes. State allows second parent adoptions by unmarried partners.	Matter of Jacob, 86 N.Y.2d 651, 660 N.E.2d 397 (1995)
North Carolina	No. State does not allow second parent adoption by unmarried partners.	Boseman v. Jarrell, 364 N.C. 537, 704 S.E.2d 494 (2010).
North Dakota	Yes. State allows second parent adoptions by unmarried partners.	N.D. CENT. CODE ANN. 14-15-03 (2).
Ohio	No. State does not allow second parent adoption by unmarried partners	OHIO REV. CODE ANN. § 3107.03 (2020). The courts have ruled that unmarried couples may not engage in second parent adoptions. *See* Emily Meyer, *LGBTQ Parenting: What You Need to Know About Adoption*, EQUAL. OHIO (July 19, 2019), https://equalityohio.org/lgbtq-parenting-what-you-need-to-know-about-adoption/ [https://perma.cc/5A9V-CTJA].

Oklahoma	Yes. State allows second parent adoptions by unmarried partners.	OKLA. STAT. tit. 10, § 7503-2.1 (2020); Eldredge v. Taylor, 339 P.3d 888, 893 (Okla. 2014) (holding that "Just as step-parents may adopt a spouse's child, so may a same-sex partner adopt a partner's child. This public policy of allowing parents to share custody and control of their child by consent with a non-parent is found in the newly enacted" statute); OKLA. STAT. tit. 10, § 700 (A) (2020); Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).
Oregon	Yes. State allows second parent adoptions by unmarried partners.	No statute grants authority, but the family courts have granted unmarried couples second parent adoptions. *See* G. Aron Perez-Selsky, *Stepparent and Second Parent Adoptions*, OR. STATE BAR (last updated May 2018), https://www.osbar.org/public/legalinfo/1136_Adoptions.htm [https://perma.cc/6T7G-ATC8]; *see also* Katrina Greiner, *Foster Care and Adoption*, 5 GEO. J. GENDER & L. 503, 527-28 (2004) (listing Oregon as a state where lower courts have approved second parent adoption for same-sex couples).
Pennsylvania	Yes. State allows second parent adoptions by unmarried partners.	In re Adoption of R.B.F., 803 A.2d 1195,1197 (Pa. 2002) (finding there is no language explicitly preventing unmarried same-sex partners from either jointly adopting or executing an adoption through a second parent adoption).
Rhode Island	Yes. Statute does not specifically address second parent adoptions but courts have routinely permitted them	15 R.I. GEN. LAWS ANN. § 15-7-4.
South Carolina	State law does not explicitly permit second parent adoptions by unmarried partners but some judges within the state have granted such adoptions.	Carson v. Heigel, No. 3:16-0045-MGL, 2017 WL 624803 (D.S.C. Feb. 15, 2017).
South Dakota	No. State does not allow second parent adoption by unmarried partners.	S.D. CODIFIED LAWS § 25-6-10 (2020).

Tennessee	No. State does not allow second parent adoptions by unmarried partners.	TENN. CODE ANN. §§ 36-1-115(a)-(c); § 36-1-117(f) (2020).
Texas	Yes. State does allow second parent adoption by unmarried partners.	See joint adoption statutory authority; Hobbs v. Van Stavern, 249 S.W.3d 1,3 (Tex. App. 2006) (holding that the adoption by a same sex couple was not void).
Utah	No. State does not allow second parent adoptions by unmarried partners.	UTAH CODE ANN. § 30-5a-103.
Vermont	Yes. State allows second parent adoptions by unmarried partners.	VT. STAT. ANN. tit. 15A § 102(a) (2020); In re Adoption of B.L.V.B., 160 Vt. 368 (1993).
Virginia	Yes. State permits second parent adoption by unmarried partners.	VA. CODE ANN. § 63.2-1241 (2021) (permitting "a person with a legitimate interest" to file a joint petition for adoption with the child's existing legal parent).
Washington	Yes. State permits second parent adoption by unmarried partners.	1 LexisNexis Practice Guide: Washington Family Law § 13.10 (2019).
West Virginia	No. State does not allow second parent adoption by unmarried partners.	W. VA. CODE ANN. § 48-22-201.
Wisconsin	No. State does not allow second parent adoption by unmarried partners.	In Interest of Angel Lace M., 184 Wis. 2d 492, 518, 516 N.W.2d 678, 686 (1994).
Wyoming	No. State does not allow second parent adoption by unmarried partners.	WYO. STAT. ANN. § 1-22-104 (An adoption petition "may be filed by any single adult or jointly by a husband and wife who maintain their home together, or by either the husband or wife if the other spouse is a parent of the child").

Table 3

State	Unmarried partners may be recognized as de facto or psychological parents	Authority
Alabama	No. No state statute or caselaw recognizes the	

	doctrine of de facto parentage.	
Alaska	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for visitation.	Burness v. Gillen, 781 P.2d 985, 988 (Alaska 1989), *disapproved of by* Evans v. McTaggart, 88 P. 3d 1078 (Alaska 2004); ALASKA STAT. ANN. § 25.20.060 (stating that in the event of a custody dispute, a court may "provide for visitation by a grandparent or other person if that is in the best interests of the child").
Arizona	No. State does not recognize the doctrine of de facto parentage for unmarried partners	ARIZ. REV. STAT. ANN. § 25–401(4); Doty-Perez v. Doty-Perez, 388 P.3d 9, 12 (Ct. App. 2016) ("Arizona does not recognize de facto parentage.").
Arkansas	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation.	Bethany v. Jones, 2011 Ark. 67 (2011).
California	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation.	CAL. FAM. CODE §§ 3041; 7611(d).
Colorado	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation.	COLO. REV. STAT. ANN. §§ 19-4-102-05; 14-10-123 [1] [c]; In re Parental Responsibilities of A.R.L., 2013 COA 170, ¶ 20, 318 P.3d 581, 584 (Colo. Ct. of App. 2013) ("[W]e conclude that in the context of a same-sex relationship a child may have two mothers—a biological mother and a presumed mother—[and] we reverse the trial court's order denying Limberis' maternity petition. On remand, the trial court is instructed to determine whether Limberis is A.R.L.'s presumptive mother under the UPA's holding out provision.").
Connecticut	Yes. State law currently permits de facto parents to sue for visitation. Effective July 1, 2022, state law will recognize de facto parents as full legal parents.	CONN. GEN. STAT. ANN. § 46b-59 (b) (Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child); *see also* Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999).
Delaware	Yes. State law recognizes de facto parentage doctrine and	DEL. CODE. ANN. tit. 13 § 8-201; Smith v. Guest, 16 A.3d 920, 936 (Del. 2011) (affirming the constitutionality of including

	treats de facto parents as full legal parents.	de facto parents within the definition of parent in the statute).
District of Columbia	Yes. State law permits de facto parents to sue for custody and visitation.	D.C. CODE ANN. § 16-831.03 (2009).
Florida	No. State does not recognize the doctrine of de facto parentage for unmarried partners	Russell v. Pasik, 178 So. 3d 55, 55 (Fla. Dist. Ct. App. 2015); Springer v. Springer, 277 So. 3d 727 (Fla. Dist. Ct. App. 2019).
Georgia	Yes. State recognizes de facto parent as a legal parent using the equitable caregiver doctrine.	GA. CODE § 19-7-3.1.
Hawaii	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation.	HAW. REV. STAT. ANN. §§ 571-46(a)(2), 571-46(a)(2), 571-46(a)(3) (2020); A.A. v. B.B., 384 P.3d 878, 882 (Haw. 2016).
Idaho	No. State's de facto doctrine requires biological relation by three degrees of consanguinity	IDAHO CODE § 32-1703.
Illinois	No. State does not recognize the de facto parent doctrine.	In re Scarlet Z.-D., 28 N.E.3d 776, 790 (Ill. App. Ct. 2015) (finding that a non-biological, non-adoptive parent could not petition for custody, visitation, or support as child's "parent" because "Illinois does not recognize functional parent theories"); In re T.P.S., 978 N.E.2d 1070, 1085 (Ill. App. Ct. 2012) (finding that neither the legislature nor the Illinois courts have ever recognized the equitable parent doctrine).
Indiana	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation.	IND. CODE § 31-9-2-35.5.
Iowa	No. State's de facto doctrine is very narrow and applies only to married males in different-sex couples.	Petition of Ash, 507 N.W.2d 400, 401 (Iowa 1993).

Kansas	Yes. State recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation.	Frazier v. Goudschaal, 296 Kan. 732 (2013).
Kentucky	Yes. State law permits functional parents to sue for custody and visitation.	Mullins v. Picklesimer, 317 S.W.3d 569, 579 (Ky. 2010), *as modified on denial of reh'g* (Aug. 26, 2010) (when a legal parent waives her superior right to custody by "demonstrating an intent to co-parent a child with a nonparent," the co-parent has standing to seek custody and visitation with the child).
Louisiana	No. State law does not allow a functional parent standing to seek custody or visitation with a child.	State *ex rel.* Wilson v. Wilson, 855 So.2d 913, 914 (La. App. 2 Cir. 2003).
Maine	Yes. State law permits functional parents to sue for custody and visitation.	ME. STAT. 19-a § 1891(3) (2020).
Maryland	Yes. State law permits functional parents to sue for custody and visitation.	Conover v. Conover, 450 Md. 51, 146 A.3d 433 (2016).
Massachusetts	Yes. State law recognizes de facto parentage doctrine and permits de facto parents to sue for custody and visitation. Parents can be recognized as legal parents under statutory holding out provision.	E.N.O. v. L.M.M., 711 N.E. 2d 886 (Mass. 1999) ("The court today adopts a "de facto parent" doctrine[.]"); MASS. GEN. LAWS ch. 209C, § 6(a)(4); Partanen v. Gallagher, 59 N.E.3d 1133, 1135 (2016) (holding that a person may establish themselves as a child's presumptive parent under G.L. ch. 209C, § 6(a)(4), in the absence of a biological relationship with the child).
Michigan	No. State recognizes functional parents only when they are married to the legal / biological parent.	Mabry v. Mabry, 499 Mich. 997, 882 N.W.2d 539 (2016).
Minnesota	Yes. State law permits permits functional parents to sue for visitation.	MINN. STAT. § 257C.08 (4); SooHoo v. Johnson, 731 N.W.2d 818 (Minn. 2007).
Mississippi	Yes. State law permits funcitonal parents to	Miller v. Smith, 229 So. 3d 148, 152-53 (Miss. Ct. App. 2016), *aff'd*, 229 So. 3d 100

	sue for custody and visitation but rights are subordinate to biological/legal parent.	(Miss. 2017) (holding that in a custody contest between "one standing in loco parentis and a natural parent, the parent is entitled to custody unless the natural-parent presumption is rebutted").
Missouri	Yes. State law permits functional parents to sue for custody and visitation.	K.M.M. v. K.E.W., 539 S.W.3d 722, 737 (Mo. Ct. App. 2017) (finding functional parent had standing to assert custody claim).
Montana	Yes. State law permits functional parents to sue for custody and visitation.	MONT. CODE ANN. § 40–4–228.
Nebraska	Yes. State law permits functional parents to sue for custody and visitation.	Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011).
Nevada	Yes. State law permits functional parents to sue for custody and visitation.	NEV. REV. STAT. §§ 126.051; 125C.050; 125C.050 (8)(c)(2); *see also* St. Mary v. Damon, 309 P.3d 1029 (Nev. 2013).
New Hampshire	Yes. State law permits functional parents to sue for custody and visitation.	In re Guardianship of Madelyn B., 166 N.H. 453, 98 A.3d 494 (2014) (finding that a child could have two mothers under the New Hampshire "holding out" statute and clarifying it could apply to non-birth mother); *see also* N.H. REV. STAT. ANN. § 168-B:2 (V)(d).
New Jersey	Yes. State law permits functional parents to sue for visitation.	V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000).
New Mexico	Yes. State law permits functional parents to sue for custody and visitation.	N.M. STAT. ANN. § 40-11A-204 (A)(5); Chatterjee v. King, 280 P.3d 283, 285 (N.M. 2012) (holding that non-adoptive mother could pursue custody as a natural parent because she supported and cared for the child since it entered the couple's lives).
New York	Yes. State law permits functional parents to sue for custody and visitation.	N.Y. Dom. Rel. Law § 70; Matter of Brooke S.B . v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).
North Carolina	Yes. State law permits functional parents to sue for custody and visitation.	Boseman v. Jarrell, 364 N.C. 537, 704 S.E.2d 494 (2010); N.C. GEN. STAT. ANN. § 50-13.1(a).

North Dakota	Yes. State law permits functional parents to sue for custody and visitation.	McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010) (upholding custody award to "psychological parent" where a child "has been in the actual physical custody of the third party for a sufficient period time to develop a psychological parent relationship").
Ohio	Yes. State law permits functional parents to sue for visitation.	OHIO REV. CODE ANN. § 3109.051 (2020); *see* In re Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) (finding that although the court did not have the authority to grant custody to a non-biological, non-adoptive spouse since the term "parent" refers to an adoptive or natural parent under the law, the same-sex couple could petition the court to enter into a shared custody agreement, which would allow custody be given to the spouse as well).
Oklahoma	Yes. State law permits functional parents to sue for custody and visitation.	OKLA. STAT. tit 43, § 112.5 (2020); Schnedler v. Lee, 445 P.3d 238 (Okla. 2019).
Oregon	Yes. State law permits functional parents to sue for visitation.	OR. REV. STAT. § 109.119 (1) (2020); Husk v. Adelman, 383 P.3d 961, 966 (Or. Ct. App. 2016) (finding that after the separation of a same sex couple, the non-biologic, non-adoptive partner was only allowed visitation and not access to medical and educational records, because the court could not grant noncustodial parental rights, only visitation).
Pennsylvania	Yes. State law permits functional parents to sue for custody and visitation.	C.G. v. J.H., 193 A.3d 891, 905 (Pa. 2018) (permitting non-biological non-adoptive parent to seek custody as a person standing in loco parentis to child); T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001); L.S.K. v. H.A.N., 813 A.2d 872, 875-77 (Pa. Super. Ct. 2002).
Rhode Island	Yes. State law permits functional parents to sue for custody and visitation.	15 R.I. GEN. LAWS ANN. § 15-8.1-501; Rubano v. DiCenzo, 759 A.2d 959, 967 (R.I. 2000).
South Carolina	No. State does not recognize the doctrine of de facto parentage for unmarried partners.	S.C. CODE ANN. §§ 63-15-60 (A), 63-15-60 (B), 63-15-60 (C) (2020); Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006).

South Dakota	Yes. State law permits functional parents to sue for visitation.	S.D. CODIFIED LAWS § 25-5-29 (2020).
Tennessee	No. State does not recognize the doctrine of de facto parentage.	Pippin v. Pippin, No. M2018-00376, 2020 WL 2499633 (Tenn. Ct. App. 2020) (holding that the non-biological mother could not bring an action because the term father could not be substituted. The court explicitly stated it would not recognize the doctrine of de facto parentage).
Texas	Yes. State law permits functional parents to sue for custody and visitation.	TEX. FAMILY CODE ANN. § 102.003(a)(9) (2020); In re M.K.S.-V, 301 S.W.3d 460, 465 (Tex. App. 2009); Coons-Andersen v. Andersen, 104 S.W.3d 630, 634-45 (Tex. App. 2003) (both discussing the doctrine of in loco parentis and granting standing to the non-biological mother in M.K.S.).
Utah	No. State does not recognize the doctrine of de facto parentage.	Jones v. Barlow, 154 P.3d 808, 819 (Utah 2007).
Vermont	Yes. State law recognizes a de facto parent as a legal parent and permits functional parents to sue for custody and visitation.	VT. STAT. ANN. tit. 15C § 501(a)(1)(A)-(F) (2020).
Virginia	No. State does not recognize the doctrine of de facto parentage.	Stadler v. Siperko, 661 S.E.2d 494, 496 (Va. App. 2008) (holding that the state already had a legal framework in place to protect the interests of children and the law does not have to be expanded to recognize de facto parentage); Hawkins v. Grese, 809 S.E.2d 441, 467 (Va. Ct. App. 2018) (reaffirming the holding of Stadler).
Washington	Yes. State recognizes de facto parent as a legal parent	WASH. REV. CODE ANN. § 26.26A.440.
West Virginia	Yes. State law recognizes psychological parents and permits them to sue for custody and visitation in exceptional circumstances.	In re Clifford K., 217 W. Va. 625, 619 S.E.2d 138 (2005).

Wisconsin	Yes. State law permits functional parents to sue for visitation.	In re Custody of H.S.H.-K., 193 Wis. 2d 649 N.W.2d 419 (Wis. 1995).
Wyoming	State does not recognize the doctrine	WYO. STAT. ANN. § 14-2-504(a)(v) (2020); L.P. v. L.F., 338 P.3d 908, 920 (Wyo.2014) (did not meet two year holding out requirement).

Table 4

State	State Assisted Reproduction Law Includes Unmarried Partners	Authority
Alabama	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	ALA. CODE § 26-17-703, Act 2008, 376, § 2.
Alaska	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	ALASKA STAT. ANN. § 25.20.045.
Arizona	No. State law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	ARIZ. REV. STAT. ANN. § 25-501(B); *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017) (holding that Arizona's marital presumption applied in a gender neutral manner).
Arkansas	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	ARK. CODE ANN. § 9-10-201
California	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	CAL. FAM. CODE § 7613(a) ("If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived. The other intended parent's consent shall be in writing and signed by the other intended parent and the woman

		conceiving through assisted reproduction.”).
Colorado	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	COLO. REV. STAT. ANN. § 19-4-106.
Connecticut	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	2021 Conn. Legis. Serv. P.A. 21-15 (H.B. 6321), § 53-55.
Delaware	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	DEL. CODE ANN. tit. 13, § 8-201(a)(6) (A woman can establish a mother-child relationship by “having consented to assisted reproduction by another woman under subchapter VII of this chapter which resulted in the birth of the child”).
District of Columbia	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	D.C. CODE ANN. 16-401 (2017) (“(16) ‘Intended parent’ means an individual, married or unmarried, who manifests the intent in a written agreement to be legally bound as the parent of a child.”).
Florida	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	FLA. STAT. ANN. § 742.11.
Georgia	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	GA. CODE ANN. § 19-8-42.
Hawaii	No state statute or caselaw addresses parentage of children conceived using ART	None.
Idaho	No. State Assisted Reproduction Law only addresses married	IDAHO CODE ANN. § 39-5405 ; Doe v. Doe, 162 Idaho 254, 258 395 P.3d 1287, 1291 (2017).

	couples use of donor insemination. Case law establishes that unmarried same-sex partners are not able to utilize this statute.	
Illinois	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	750 ILL. COMP. STAT. ANN. 46/703 (2017) ("If a person makes an anonymous gamete donation without a designated intended parent at the time of the gamete donation, the intended parent is the parent of any resulting child if the anonymous donor relinquished his or her parental rights in writing at the time of donation. The written relinquishment shall be directed to the entity to which the donor donated his or her gametes."); 750 ILL. COMP. STAT. ANN. 46/103 (m-5) ("Intended parent" means a person who enters into an assisted reproductive technology arrangement, including a gestational surrogacy arrangement, under which he or she will be the legal parent of the resulting child); In re T.P.S., 978 N.E.2d 1070, 1079 (Ill. App. Ct. 2012).
Indiana	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	IND. CODE § 31-20-1.
Iowa	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	IOWA ADMIN. CODE r. 641-99.15(144).
Kansas	No. State assisted reproduction law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	KAN. STAT. ANN. § 23-2302; In re W.I., 56 Kan. App. 2d 960 (2019).
Kentucky	No state statute or caselaw addresses parentage of children conceived using ART	None.

Louisiana	No state statute or caselaw addresses parentage of children conceived using ART	None.
Maine	Yes. Any "person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child."	ME. STAT. 19-a § 1923 (2020).
Maryland	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	MD. CODE ANN., EST. & TRUSTS § 1-208; MD. CODE ANN., FAM. LAW § 5-3B-27.
Massachusetts	No. State assisted reproduction law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	MASS. GEN. LAWS ANN. ch. 46, § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.").
Michigan	No. State assisted reproduction law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	MICH. COMP. LAWS ANN. § 333.2824; *cf*. LeFever v. Matthews, 353106, 2021 WL 1232747 (Mich. App. 2021) (recognizing two unmarried women as parents because one provided the egg and the other carried the children).
Minnesota	No. State law only grants parentage to a non-biological parent who is the husband of the person giving birth or a "man who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child."	MINN. STAT. ANN. §§ 257.56; 524.2-120 (2021) ("[A] parent-child relationship is presumed to exist between a child of assisted reproduction and a man who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child.").
Mississippi	No. State has no assisted reproduction law, other statutes and caselaw only grant parentage to a non-	MISS. CODE. ANN. § 93-9-10 (2) (d) (2020) (stating that a husband cannot disestablish his parentage if the child was conceived through artificial insemination while the couple was married); *see also* Strickland v.

	biological parent who is the spouse of the person giving birth.	Day, 239 So. 3d 486, 494 (Miss. 2018) (holding that the doctrine of equitable estoppel precluded the biological mother from challenging her wife's parentage because the couple jointly and intentionally agreed to have their child through the use of artificial insemination).
Missouri	No. State assisted reproduction law only grants parentage to a non-biological parent who is the husband of the person giving birth.	MO. REV. ST. § 210.824 (2017).
Montana	No. State assisted reproduction law only grants parentage to a non-biological parent who is the husband of the person giving birth.	MONT. CODE ANN. § 40-6-106.
Nebraska	No. No state statute grants parentage to a non-biological intended parent of a child conceived through ART, but paternity statute indicates that when a man is legally determined to be the father of a child that finding cannot be set aside based on genetic evidence if he "knew that the child was conceived through artificial insemination."	NEB. REV. STAT. ANN. § 43-1412.01 (2020).
Nevada	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	NEV. REV. STAT. §§ 126.510; 126.690; *see also* St. Mary v. Damon, P.3d 1029 (Nev. 2013).
New Hampshire	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	N.H. REV. STAT. ANN. § 168-B:2(II)

New Jersey	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	N.J. STAT. ANN. § 9:17-44 (2020).
New Mexico	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	N.M. STAT. ANN. § 40-11A-703 (2021) (A person who . . . consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child").
New York	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	N.Y. FAM. CT. ACT § 581-303 (2021).
North Carolina	No. State assisted reproduction law only grants parentage to a non-biological parent who is the husband of the person giving birth.	N.C. GEN. STAT. ANN. § 49A-1 ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."); Moriggia v. Castelo, 256 N.C. App. 34, 805 S.E.2d 378 (2017).
North Dakota	No. Statute allows only "a man" to establish parentage by consenting to his partner becoming pregnant through assisted reproduction.	N.D. CENT. CODE. ANN. §§ 14-20-61; 14-20-62
Ohio	No. State assisted reproduction law only grants parentage to a non-biological parent who is the husband of the person giving birth.	OHIO REV. CODE ANN. §§ 3111.88, 3111.95 (2020).
Oklahoma	No. State assisted reproduction law only grants parentage to a non-biological parent who is the husband of the person giving birth.	OKLA. STAT. tit. 10, §§ 555, 552, 553, 556 (2020).

Oregon	No. State assisted reproduction law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	OR. REV. STAT. §§ 109.239, 109.243 (2020); *see* In re Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015) (finding that just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice — commitment without marriage, and because the assisted reproductive statute would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice).
Pennsylvania	No state statute addresses parentage of children conceived using ART; caselaw indicates non-biological intended parent will be recognized as a parent only when there is an explicit contract with the birthing parent.	C.G. v. J.H., 193 A.3d 891, 905 (Pa. 2018) ("[Petitioner] contends our case law stands for the broad proposition that parentage can be established by intent in situations where a child is born with the aid of assistive reproductive technology. It does not."); In re Baby S., 128 A.3d 296, 306-07 (Pa. Super. Ct. 2015); Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007); J.F. v. D.B., 897 A.2d 1261, 1280 Pa. Super. Ct. 2006).
Rhode Island	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	15 R.I. GEN. LAWS ANN. § 15-8.1-703.
South Carolina	No state statute addresses parentage of children conceived using ART; caselaw recognizes only a non-biological intended parent who is husband of the person giving birth as a legal parent.	In re Baby Doe, 291 S.C. 389, 392, 353 S.E.2d 877, 878 (1987) ("[A] husband who consents for his wife to conceive a child through artificial insemination, with the understanding that the child will be treated as their own, is the legal father of the child[.]").
South Dakota	No state statute addresses parentage of children conceived using ART.	None.
Tennessee	No. State Assisted Reproduction Law only grants parentage to a non-biological parent	TENN. CODE ANN. §§ 68-3-306, 36-2-402, 36-2-403(a); 36-2-403(d) (2020).

	who is the spouse of the person giving birth.	
Texas	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	TEX. FAMILY CODE ANN. §§ 160.102(2), 160.102(6), 160.702, 160.703, 160.7031, 160.704 (2020).
Utah	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	UTAH CODE ANN. § 78B-15-704; Roe v. Patton, 2015 WL 4476734 (D. Utah 2015).
Vermont	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	VT. STAT. ANN. tit. 15C § 703 (2020) (Any "person who consents to assisted reproduction by another person with the intent to be the parent of child conceived by the assisted reproduction is a parent of the child").
Virginia	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	VA. CODE ANN. § 20-156, 20-158(A) (2020); L.F. v. Breit, 736 S.E.2d 711, 715 (Va. 2013) (holding that the while the statute is based on marriage status it does have a legitimate purpose).
Washington	Yes. State law recognizes non-biological intended parent as parent even if not married to the person giving birth.	WASH. REV. CODE ANN. § 26.26A.610 ("An individual who consents under RCW 26.26A.615 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.")
West Virginia	No state statute or caselaw addresses parentage of children conceived using ART	None.
Wisconsin	No. State Assisted Reproduction Law only grants parentage to a non-biological parent who is the spouse of the person giving birth.	WIS. STAT. § 891.40 (1) (2020).
Wyoming	State Assisted Reproduction law does not include unmarried parents other than "A	WYO. STAT. ANN. §§ 14-2-402(viii), 14-2-902, 14-2-903, 14-2-904 (2020).

	man who provides sperm for, or consents to, assisted reproduction by a woman[.]"	

Table 5

State	State Permits Surrogacy for Unmarried Couples	Authority
Alabama	No. State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	§ 36:4. Alabama law on surrogacy, 2 Crittenden and Kindregan, Alabama Family Law § 36:4.
Alaska	No. State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	*Gestational Surrogacy in Alaska*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/alaska/ (last visited Feb. 22, 2022) [https://perma.cc/2ER2-MH2X].
Arizona	No. State law states that no person may enter into or assist in creating a surrogacy contract, and it presumes that the surrogate is the legal mother.	ARIZ. REV. STAT. § 25-218; Soos v. Superior Court, 897 P.2d 1356 (Ariz. App. 1st Div. 1994) (holding that the surrogacy statute violated equal protection clause because it only allowed biological father to prove paternity, and biological mother who donated eggs could not do the same). Since this decision, intendent parents can rebut statutory presumption that surrogate is legal mother.
Arkansas	No. Surrogacy is legal in the state but non-biological intended parent is not recognized as a legal parent.	ARK. CODE ANN. § 9-10-201.
California	Yes. State permits surrogacy for unmarried couples and non-biological	CAL. FAM. CODE ANN. § 7962.

	intended parent is a legal parent.	
Colorado	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	None.
Connecticut	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	CONN. GEN. STAT. § 7-48a (b); Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) ("'The statute' allows an intended parent who is a party to a valid gestational agreement to become a parent without first adopting the children, without respect to that intended parent's genetic relationship to the children.").
Delaware	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	DEL. CODE ANN. tit. 13, § 8-201(a)(5) (A woman can establish a mother-child relationship by "intending to be the mother of a child born pursuant to a gestational carrier arrangement"); *Id.* §§ 8-806(b), 8-805.
District of Columbia	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	D.C. CODE ANN. §§ 16-401, 16-407 (2017) ("[I]ntended parent or parents [of a child born through gestational surrogacy] shall be the parent or parents of the child and have all rights under District law, regardless of whether the intended parent or parents has a genetic relationship to the child.").
Florida	No. State law limits surrogacy only to married couples where the "commissioning mother" cannot gestate a pregnancy to term.	FLA. STAT. ANN. § 742.15 (2019).
Georgia	No surrogacy laws but attorneys and advocates indicate judges will enforce surrogacy agreements in court.	None.
Hawaii	No surrogacy laws but attorneys and advocates indicate judges will enforce	None.

	surrogacy agrements in court.	
Idaho	No. State does not have any surrogacy laws so there is no marital requirement, however, non-biological intended parent must adopt to gain parentage.	Matter of Doe, 160 Idaho 360, 372 P.3d 1106 (2016).
Illinois	Yes. State permits surrogacy for unmarried partners and non-biological parent is a legal parent.	750 ILL. COMP. STAT. ANN. 46/709 (2017); 750 ILL. COMP. STAT. ANN. 47/10 (2005); 750 ILL. COMP. STAT. ANN. 47/15 (2005).
Indiana	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	IND. CODE 31-20-1.
Iowa	No. State law does not prohibit surrogacy for unmarried couples but non-biological intended parent must adopt to gain parentage.	P.M. v. T.B., 97 N.W.2d 522 (Iowa 2018).
Kansas	No. State law does not prohibit surrogacy for unmarried couples but non-biological intended parent must adopt to gain parentage.	*Gestational Surrogacy in Kansas*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/kansas/ (last visited Feb. 22, 2022) [https://perma.cc/BZ9A-ESEF].
Kentucky	No. State law does not prohibit surrogacy for unmarried couples but non-biological intended parent must adopt to gain parentage.	KY. REV. STAT. ANN. § 199.590 (4) (forbidding and voiding contracts to "compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination"); *Gestational Surrogacy in Kentucky*, CREATIVE FAM. CONNECTIONS, http://www.creativefamilyconnections.com/us-surrogacy-law-map/kentucky (last visited Feb. 22, 2022) [https://perma.cc/8ZQ9-JGFM].

Louisiana	No. State law limits gestational surrogacy to heterosexual married couples using their own gametes.	LA. STAT. ANN. § 9:2718 (2020).
Maine	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	ME. STAT. 19-a § 1931 (2020).
Maryland	State law does not authorize or prohibit surrogacy agreements. Attorneys and advocates indicate that non-biological intended parents can obtain orders of parentage in the state	*Gestational Surrogacy Law in Maryland*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/surrogacy-maryland-law/ (last visited Feb. 22, 2022) [https://perma.cc/JJV6-XGKX].
Massachusetts	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 291, 756 N.E.2d 1133, 1138 (2001) (holding that heterosexual intended parents of a child born through surrogacy could obtain a parentage judgment because they were the genetic parents).
Michigan	No. All compensated surrogacy is prohibited, compassionate surrogacy agreements are unenforceable.	MICH. COMP. LAWS ANN. §§ 722.855, 722.859.
Minnesota	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	A.L.S. *ex rel.* J.P. v. E.A.G., 2010 WL 4181449 (Minn. Ct. App. 2010).
Mississippi	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological	*Mississippi Surrogacy Law Overview*, CTR. FOR SURROGATE PARENTING, LLC, https://www.creatingfamilies.com/us/mississippi-surrogacy-law-overview/ (last visited Feb. 22, 2022) [https://perma.cc/B3SA-

	intended parent to be recognized as a legal parent.	3YMV]; *What You Need to Know About Surrogacy in Mississippi*, AM. SURROGACY, https://www.americansurrogacy.com/surrogacy/mississippi-surrogacy-laws (last visited Feb. 22, 2022) [https://perma.cc/T5BR-A7HL].
Missouri	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	*Missouri Surrogacy Law Overview*, CTR. FOR SURROGATE PARENTING, LLC, https://www.creatingfamilies.com/us/missouri-surrogacy-law-overview/ (last visited Feb. 22, 2022) [https://perma.cc/VZ9A-KVGF].
Montana	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	*Montana Surrogacy Law Overview*, CTR. FOR SURROGATE PARENTING, LLC, https://www.creatingfamilies.com/us/montana-surrogacy-law-overview/ (last visited Feb. 22, 2022) [https://perma.cc/ZJ8K-4D7C].
Nebraska	No. State law prohibits surrogacy contracts. No statute provides for a non-biological intended parent to be recognized as a legal parent.	NEB. REV. STAT. ANN. § 25-21,200 (1) (2020).
Nevada	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	NEV. REV. STAT. ANN. §§ 126.720, 126.740.
New Hampshire	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	N.H. REV. STAT. ANN. § 168-B:7.
New Jersey	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	N.J. STAT. ANN. § 9:17-60 (2020).

New Mexico	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	N.M. STAT. ANN. § 40-11A-801 (2020) (holding state law "does not authorize or prohibit an agreement [for surrogacy]").
New York	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	N.Y. FAM. CT. ACT § 581-406 (2021).
North Carolina	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	*Gestational Surrogacy in North Carolina*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/north-carolina/ (last visited Feb. 22, 2022) [https://perma.cc/YQ2L-TRBS].
North Dakota	No. State law permits gestational surrogacy but intended parents are recognized as the parents of a resulting child but only where the intended parents "own egg and sperm" were used to conceive.	N.D. CENT. CODE. ANN. §§ 14-18-08; 14-18-05; 14-18-01.
Ohio	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	J.F. v. D.B., 879 N.E.2d 740, 741-42 (Ohio 2007) (holding gestational surrogacy contract did not violate public policy and genetic intended father was parent of the children rather than gestational surrogate and her husband). However, the law does not establish parentage, and Ohio law refers to only "natural or adoptive parents" so two unmarried adults who were not the genetic parents likely could not obtain parentage through a surrogacy agreement alone. *See* OHIO REV. CODE ANN. § 3111.01 (2020) (stating a "'parent and child relationship' means the legal relationship that exists between a child and the child's natural or adoptive parents").

Oklahoma	No. State allows only married couples to enter into a surrogacy contract as intended parents.	OKLA. STAT. tit. 10, §§ 557.1, 557.6, 557.5(4) (2020); OKLA. STAT. tit. 21, § 866 (2020).
Oregon	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	There are no laws or statutes governing surrogacy, however the lower courts have granted prebirth orders for unmarried same sex couples. *See* Alex Finkelstein, et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, 11 (2016), https://web.law.columbia.edu/sites/default/files/microsites/gender sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf [https://perma.cc/UY4B-HJ5N] (finding that although there are no statutes governing surrogacy, surrogacy agencies consider Oregon to be a surrogacy-friendly jurisdiction because it grants pre-birth parentage orders). However, the courts can deny the prebirth orders, in which case the non-biologic parent would need to adopt the child after birth. *See Is Surrogacy Legal in Oregon?*, SURROGATE, https://surrogate.com/surrogacy-by-state/oregon-surrogacy/oregon-surrogacy-laws/ (last visited July 1, 2020) [https://perma.cc/UK5W-NRSQ].
Pennsylvania	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	In re Baby S., 128 A.3d 296, 306-07 (Pa. Super. Ct. 2015) (holding enforcement of gestational carrier agreements is not prohibited by law); Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) (finding that no dominant public policy exists against the enforcement of surrogacy agreements regarding assisted reproductive technologies); J.F. v. D.B., 897 A.2d 1261, 1280 Pa. Super. Ct. 2006); C.G. v. J.H., 193 A.3d 891, 893 (Pa. 2018).
Rhode Island	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	15 R.I. GEN. LAWS ANN. § 15-8.1-801.

South Carolina	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	MidSouth Ins. Co. v. Doe, 274 F.Supp.2d 757 (D.S.C. 2003).
South Dakota	State law does not authorize or prohibit surrogacy agreements. No statute provides for a non-biological intended parent to be recognized as a legal parent.	None.
Tennessee	No. State allows only married couples to enter into a surrogacy contract as intended parents.	TENN. CODE ANN. § 36-1-102(51) (2020); In re Baby, 447 S.W.3d 807, 840 (Tenn. 2014) (holding that surrogacy contracts are recognized in Tennessee but did not address the marriage requirement).
Texas	No. State allows only married couples to enter into a surrogacy contract as intended parents.	TEX. FAMILY CODE ANN. §§ 160.752, 160.754(a)-(b), 160.102(9) (2020); Berwick v. Wagner, 509 S.W.3d 411, 414 (Tex. App. 2014) (holding that both parents of surrogacy were recognized under the full faith and credit clause of the constitution because the surrogacy occurred in California).
Utah	No. State allows only married couples to enter into a surrogacy contract as intended parents.	In re Gestational Agreement, 449 P.3d 69, 84 (Utah 2019); UTAH CODE ANN. § 78B-15-801(7).
Vermont	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	VT. STAT. ANN. tit. 15C § 801(a)(1)-(4) (2020).
Virginia	No. State allows only a married couple or an unmarried individual to enter into a surrogacy contract as intended parent(s).	VA. CODE ANN. § 20-156, 20-159 (2020).

Washington	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	WASH. REV. CODE ANN. § 26.26A.705, 26.26A.715.
West Virginia	Surrogacy is permitted in West Virginia but it is not clear that the non-biological intended parent of a child conceived through surrogacy will be recognized as a parent.	W. VA. CODE ANN. § 61-2-14h(e)(3).
Wisconsin	State Supreme Court held that surrogacy contracts are enforceable under the law, as long as they are in the best interests of the child. But it is not clear that a non-biological intended parent of a child created through surrogacy will be recognized as a legal parent. Unmarried same sex couples' ability to get parentage orders varies by county and judge.	In re the Paternity of F.T.R., 349 Wis.2d 84 (Wis. 2013); *Gestational Surrogacy in Wisconsin*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/wisconsin/ (last visited Feb. 22, 2022) [https://perma.cc/K95H-KYG4].
Wyoming	Yes. State permits surrogacy for unmarried couples and non-biological intended parent is a legal parent.	WYO. STAT. ANN. §§ 35-1-401, 35-1-401(a)(xiv).

Table 6

State	Gender Neutral VAP Law	Authority
Alabama	No. Only a man can sign a VAP.	ALA. CODE § 26-17-301.
Alaska	No. Only a man can sign a VAP.	ALASKA STAT. ANN. § 18.50.165.

Arizona	No. Only a man can sign a VAP.	ARIZ. REV. STAT. ANN. § 25-812.
Arkansas	No. Only a man can sign a VAP.	ARK. CODE ANN. § 9-10-120.
California	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	CAL. FAM. CODE ANN. § 7573.
Colorado	No. Only a man can sign a VAP.	COLO. REV. STAT. ANN. § 19-4-105.
Connecticut	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	See upcoming Connecticut law: 2021 Conn. Legis. Serv. P.A. 21-15 (H.B. 6321) (West) Section 25 and 26, as well as revised statute CONN. GEN. STAT. ANN. § 46b-172.
Delaware	No. Only a man can sign a VAP.	DEL. CODE ANN. tit. 13, § 8-301 ("The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity.").
District of Columbia	No. Only a man can sign a VAP.	D.C. CODE ANN. § 16-2342.01 (2009).
Florida	No. Only a man can sign a VAP.	FLA. STAT. ANN. § 742.10.
Georgia	No. Only a man can sign a VAP.	GA. CODE ANN. § 19-7-46.1.
Hawaii	No. Only a man can sign a VAP	HAW. REV. STAT. ANN. § 584-4.
Idaho	No. Only a man can sign a VAP.	IDAHO CODE § 7-1106; Ayala v. Armstrong, No. 1:16-CV-00501-BLW, 2017 WL 3659161, at *4 (D. Idaho Aug. 24, 2017).
Illinois	No. Only a man can sign a VAP.	750 ILL. COMP. STAT. ANN. 46/305 (2017); 750 ILL. COMP. STAT. ANN. 46/201 (b)(2) (2017) (referring to "voluntary acknowledgment of paternity by the man").
Indiana	No. Only a man may sign a VAP.	IND. CODE 31-20-1.
Iowa	No. Only a man can sign a VAP	IOWA CODE § 252A.3A.

Kansas	No. Only a man can sign a VAP.	KAN. STAT. ANN. § 23-2204; State *ex rel* Sec'y of Dep't for Children and Families v. Smith, 306 Kan. 40 (2017).
Kentucky	No. Only a man can sign a VAP	KY. REV. STAT. ANN. § 406.021(4), 406.025(1) (2020).
Louisiana	No. Only a man can sign a VAP	LA. STAT. ANN. § 34.5.1 (2020).
Maine	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	ME. STAT. 19-a § 1861 (2021).
Maryland	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	MD. CODE ANN., FAM. LAW § 5-1028; MD. CODE ANN., HEALTH-GEN. § 4-208.
Massachusetts	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	MASS. GEN. LAWS. ANN. 209C § 2.
Michigan	No. Only a man can sign a VAP.	None.
Minnesota	No. Only a man can sign a VAP.	MINN. STAT. ANN. § 257.75.
Mississippi	No. Only a man can sign a VAP.	MISS. CODE. ANN. § 93-9-28 (2020).
Missouri	No. Only a man can sign a VAP.	MO. ANN. STAT. § 193.087.
Montana	No. Only a man can sign a VAP.	MONT. CODE ANN. § 40-6-105 (1)(e).
Nebraska	No. Only a man can sign a VAP	NEB. REV. STAT. ANN. § 43-1409 (2020).
Nevada	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	NEV. REV. STAT. §§ 126.053; 440.280(5).

New Hampshire	No. Only a man can sign a VAP.	N.H. REV. STAT. ANN. § 5-C:24.
New Jersey	No. Only a man can sign a VAP.	NJ STAT. ANN. § 9:17-41 (2020).
New Mexico	No. Only a man can sign a VAP.	N.M. STAT. ANN. § 40-11A-301 (2020).
New York	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	N.Y. PUBLIC HEALTH LAW § 4135-b(b)(ii) (2021).
North Carolina	No. Only a man can sign a VAP.	N.C. GEN. STAT. ANN. § 110-132.
North Dakota	No. Only a man can sign a VAP.	N.D. CENT. CODE. ANN. § 14-19-12.
Ohio	No. Only a man can sign a VAP.	OHIO REV. CODE ANN. § 3111.23 (2020); *see* S.N. v. M.B., 935 N.E.2d 463, 470 (Ohio Ct. App.), *cause dismissed*, 931 N.E.2d 126 (Ohio 2010) (finding that the surrogacy agreement sets forth appellee's clear intention to cause the birth of the child and raise it as her own, which manifested her voluntary acknowledgement of maternity, which is sufficient to rebut the presumption that appellant is the child's natural mother by reason of her having given birth to the child). This however, would most likely not allow a same sex couple establish parentage. *See* Julia Saladino, *Is A Second Mommy A Good Enough Second Parent?: Why Voluntary Acknowledgments of Paternity Should Be Available to Lesbian Co-Parents*, 7 MODERN AM. 2, 4 (2011) (observing that court's ruling in S.N. v. M.B. is not representative of how the VAP process should operate for lesbian couples, where in most cases the lesbian co-parent would be establishing parentage of her partner's biological or birth child).
Oklahoma	No. Only a man can sign a VAP.	OKLA. STAT. tit. 10, §§ 7700-301, 7700-102 (2020); Dubose v. North, 332 P.3d 311, 313 (Okla. Civ. App. 2014).
Oregon	No. Only a man can sign a VAP.	OR. REV. STAT. § 109.070 (4) (2020).

Pennsylvania	No. Only a man can sign a VAP.	23 PA. STAT. AND CONS. STAT. ANN. § 5103(a) (2020).
Rhode Island	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	15 R.I. GEN. LAWS ANN. § 15-8.1-301.
South Carolina	No. Only a man can sign a VAP.	S.C. CODE ANN. § 63-17-20 (B).
South Dakota	No. Only a man can sign a VAP.	S.D. CODIFIED LAWS § 25-8-50 (2020).
Tennessee	No. Only a man can sign a VAP.	Tenn. Code App. §§ 68-3-305(2)(A), 24-7-113(a) (2020).
Texas	No. Only a man can sign a VAP.	TEX. FAMILY CODE ANN. § 160.301, 160.302(c) (2020).
Utah	No. Only a man can sign a VAP.	UTAH CODE ANN. § 78B-15-301.
Vermont	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	VT. STAT. ANN. tit. 15C § 301(a) (2020).
Virginia	No. Only a man can sign a VAP.	VA. CODE ANN. § 20-49.1(A)-(B)(2) (2020).
Washington	Yes. Intended parent of a child conceived through assisted reproduction can sign a VAP regardless of their gender.	WASH. REV. CODE ANN. § 26.26A.200.
West Virginia	No. Only a man can sign a VAP.	W. VA. CODE ANN. § 16-5-18.
Wisconsin	No. Only a man can sign a VAP.	WIS. STAT. § 891.405 (2020).
Wyoming	No. Only a man can sign a VAP.	Wyo. Stat. Ann. §§ 14-2-601, 14-2-601 (2020).